92-1517

No. ——

Supreme Court, U.S.
FILED
MAR 16 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

W. M. SCHLOSSER COMPANY, INC.,
Petitioner,

v.

SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

HERMAN M. BRAUDE
Counsel of Record

ROGER C. JONES
BRAUDE & MARGULIES, P.C.
1025 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 293-2993
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state rule of statutory construction, which precludes enforcement of a contract arbitration provision, where the state has statutorily conveyed the power to contract but is silent on the power to agree to an arbitration provision within a contract?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Statement of Facts	4
B. The Proceedings Below	6
REASONS FOR GRANTING THE WRIT	7
I. VIRGINIA CANNOT NULLIFY THE EFFECT OF THE FEDERAL ARBITRATION ACT ON SCHOOL BOARDS WHERE IT STATUTORILY CONVEYS THE POWER TO CONTRACT BUT IS SILENT ON THE POWER TO AGREE TO A CONTRACT ARBITRATION PROVISION	9
II. THE RULE OF LAW CREATED BY THE FOURTH CIRCUIT'S APPLICATION OF THE DILLON RULE IN THIS CASE DIRECTLY CONFLICTS WITH SECTION 2 OF THE FEDERAL ARBITRATION ACT, IN VIOLATION OF THE SUPREMACY CLAUSE	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

	Page
Boogher v. Stifel, 825 S.W.2d 27 (1992)	15
City of Atlanta v. Brinderson Corp., 799 F.2d 1541 (11th Cir. 1986)	11
County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53 (1st Cir. 1971), *cert. denied, County of Middlesex v. Gevyn Constr. Corp.*, 405 U.S. 955, 92 S. Ct. 1176, 31 L. Ed. 232 (1972)	12
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)	10
District of Columbia v. Bailey, 171 U.S. 161, 18 S. Ct. 868 (1897)	10
Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370 (8th Cir. 1983)	7, 16
King County v. Boeing Co., 18 Wash. App. 595, 570 P.2d 713 (1977)	12
Lindon City v. Engineers Construction Co., 636 P.2d 1070 (Utah 1981)	12
Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, 251 Ga. 15, 303 S.E.2d 1 (1983), *vacated*, 465 U.S. 1016, 104 S. Ct. 1263, 19 L. Ed. 670, *decision on remand*, 253 Ga. 219, 320 S.E.2d 742 (1984)	8
Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)	16
Saturn Distribution Corp. v. Williams, 905 F.2d 719 (4th Cir. 1990), *cert. denied, Williams v. Saturn Distribution Corp.*, —— U.S. ——, 111 S. Ct. 516, 112 L. Ed. 2d 527 (1990)	7, 14
Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)	7, 10, 15, 17, 18
W.M. Schlosser Co., Inc. v. School Board of Fairfax County, Va., 980 F.2d 253 (4th Cir. 1992)	1, 7

Statutes

9 U.S.C. Section 1	2
9 U.S.C. Section 2	3, 6, 13, 14
9 U.S.C. Section 4	2

TABLE OF AUTHORITIES—Continued

	Page
9 U.S.C. Section 15	2
28 U.S.C. Section 1254	2
28 U.S.C. Section 1291	2
28 U.S.C. Section 1332	2, 6
Va. Code Section 22.1-71	3, 15
Sup. Ct. R. 13.1	2
Sup. Ct. R. 13.4	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ————

W. M. SCHLOSSER COMPANY, INC.,
Petitioner,

v.

SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, in the case captioned *W.M. Schlosser Co., Inc. v. School Board of Fairfax County, Va.*, 980 F.2d 253 (4th Cir. 1992).

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 980 F.2d 253, and is reprinted in the Appendix hereto, pp. 1a-13a.

The Order of the United States District Court for the Eastern District of Virginia (Hilton, J.) denying Petitioner's Petition to Compel Arbitration and the transcript for the petition hearing are reprinted in the Appendix hereto, pp. 16a, 17a-26a.

The initial decision and Order of the magistrate judge of the United States District Court for the Eastern District of Virginia, denying Petitioner's Petition to Compel Arbitration and the transcript for the petition hearing are also reprinted in the Appendix hereto, pp. 27a, 28a-32a.

JURISDICTION

Invoking federal diversity jurisdiction under 28 U.S.C. Section 1332, Petitioner filed a Petition to Compel Arbitration in the United States District Court for the Eastern District of Virginia, pursuant to 9 U.S.C. Section 4. The dispute between the parties is the subject of a written arbitration agreement, which is governed by the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.* By Order dated December 13, 1991, the district court affirmed the decision of the magistrate judge, which denied Petitioner's Petition to Compel Arbitration.

This decision was appealed to the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28 U.S.C. Section 1291 and 9 U.S.C. Section 15. The court of appeals affirmed the decision of the district court by decision dated November 18, 1992. On December 16, 1992, the court of appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc and, by Mandate of the court, the November 18, 1992 judgment took effect as of December 23, 1992.

The jurisdiction of this Court to review the judgment of the Fourth Circuit Court of Appeals is invoked under 28 U.S.C. Section 1254(1). This Petition is being docketed within 90 days from the entry of the order denying Petitioner's petition for rehearing and the date by which the judgment of the court of appeals took effect, in accordance with Supreme Court Rules 13.1 and 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article 4, Clause 2:

This Constitution and the laws of the United States . . . shall be the supreme law of the land . . . .

9 U.S.C Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Virginia Code, Section 22.1-71. School board constitutes body corporate; corporate powers.—The duly appointed members shall constitute the school board. Every such school board is declared a body corporate and, in its corporate capacity, is vested with all the powers and charged with all the duties, obligations and responsbilities imposed upon school boards by law and may sue, be sued, contract, be contracted with and, in accordance with the provisions of this title, purchase, take, hold, lease and convey school property, both real and personal. School board members appointed by district or otherwise shall have no organization or duties except such as may be assigned to them by the school board as a whole.

STATEMENT OF THE CASE

This appeal arises from a decision of the United States Court of Appeals for the Fourth Circuit affirming the district court's denial of a Petition to Compel Arbitration, which was filed pursuant to the Federal Arbitration Act ("FAA"). The appeal raises a significant policy

issue under the FAA and the U.S. Constitution Supremacy Clause concerning preemption of a state rule of statutory construction (*i.e.*, the "Dillon Rule") that was held to preclude enforcement of a contract arbitration provision, despite the decisions of numerous other state supreme courts and federal circuit courts which have held to the contrary when confronted with issues similar in nature.

A. Statement of Facts

In June 1988, Petitioner, W. M. Schlosser Company, Inc. ("Schlosser"), entered into a contract ("Contract") with Respondent, the School Board of Fairfax County, Virginia ("School Board" and/or "Owner") for the performance of certain construction renovation work relating to the Falls Church High School (the "Project"). (Appendix p. 37a). The Contract, which was written by the School Board, consists of a number of documents including the American Institute of Architects ("AIA") Standard Form of Agreement Between Owner and Contractor, AIA Document A101, January 1974 Ed.; General Conditions of the Contract for Construction, AIA Document A201, April 1970 Ed. ("General Conditions"); and Supplementary Conditions. These Contract documents are reprinted in the Appendix at pp. 37a-133a.

With respect to the arbitration provision in question, Articles 2.2.7 and 2.2.10 of the Contract General Conditions specifically provide:

> 2.2.7 Claims, disputes and other matters in question between the Contractor and the Owner relating to the execution or progress of the Work or the interpretation of the Contract documents shall be referred initially to the Architect for decision which he will render in writing within a reasonable time.
>
> * * * *
>
> 2.2.10 Any claim, dispute or other matter that has been referred to the Architect . . . *shall be subject to*

arbitration upon the written demand of either party. However, no demand for arbitration of any such claim, dispute or other matter may be made until the earlier of:

2.2.10.1 The date on which the Architect has rendered his written decision, or

.2 The 10th day after the parties have presented their evidence to the Architect or have been given a reasonable opportunity to do so, if the Architect has not rendered his decision by that date.

(Emphasis added) (Appendix pp. 54a-55a).

During the course of the Contract, Schlosser's performance was hindered, disrupted, impacted and delayed due to the actions, inactions and active interference of the Owner. As a result, Schlosser's Contract performance was extended 209 calendar days and Schlosser suffered significant additional costs and damages. (Appendix p. 35a).

On August 3, 1990, Schlosser submitted to the Owner a claim for its additional costs and damages, in the total amount of $1,152,941.00. Since the claim related to the "execution or progress of the work," Schlosser also submitted a copy of the claim to the architect for his decision, consistent with Article 2.2.7 of the General Conditions. (Appendix p. 35a).

Schlosser then waited a reasonable time for the architect to issue a decision. In accordance with Article 2.2.10 of the General Conditions, when the architect failed to render a decision on Schlosser's claim, Schlosser submitted to the Owner a written demand for arbitration. (Appendix pp. 35a-36a, 136a).

The Owner failed to respond to Schlosser's demand for arbitration. (Appendix p. 36a). Therefore, Schlosser filed a Petition to Compel Arbitration in the U.S. District Court for the Eastern District of Virginia, invoking the

court's diversity of citizenship jurisdiction pursuant to 28 U.S.C. Section 1332. (Appendix pp. 33a, 34a).

B. The Proceedings Below

A hearing on Schlosser's Petition to Compel Arbitration was held before Magistrate Judge Brinkema. (Appendix pp. 28a-32a). In denying Schlosser's petition, the Magistrate concluded that Virginia law does not empower school boards to enter into arbitration agreements with respect to construction contract claims, notwithstanding their power to contract. (Appendix p. 32a). The court also concluded that Schlosser's claim was not subject to an arbitration agreement. (Appendix p. 31a).

Schlosser appealed the Magistrate's ruling to a district court judge and a hearing before the Honorable Claude M. Hilton was conducted on December 13, 1991. Judge Hilton also found that, despite their power to contract, school boards in Virginia do not have authority to agree to arbitrate and that, in any event, the arbitration clause had been removed from the Contract. (Appendix p. 26a). Based on these erroneous findings, Judge Hilton affirmed the Magistrate's prior decision. (Appendix p. 16a).

Schlosser appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. On November 18, 1992, the court of appeals issued the opinion of Judges Luttig, Phillips and Niemeyer. The court declined to rule on the issue of whether the Contract contained an arbitration clause. Instead, the court held:

> (1) Based on the "Dillon Rule" of strict construction, Virginia school boards do not possess the power to agree to arbitrate contract disputes and that such power cannot be implied from the school board's power to contract; and
>
> (2) The "Dillon Rule" is not preempted by the Federal Arbitration Act since it falls within the exception of 9 U.S.C. Section 2 as, "a rule of general ap-

plicability that defines and invalidates all *ultra vires* acts of local governing bodies."

W.M. Schlosser Co., Inc. v. School Board of Fairfax County, Va., 980 F.2d 253, 256, 257, 259 (4th Cir. 1992). (Appendix pp. 1a, 7a, 8a, 12a-13a).

On December 1, 1992, Schlosser filed a Petition for Rehearing and Suggestion for Rehearing En Banc. By Order dated December 16, 1992, the court of appeals denied this petition, without opinion. (Appendix p. 14a). Thereafter, by Mandate issued December 23, 1992, the November 18, 1992 judgment of the court of appeals took effect as of December 23, 1992. (Appendix p. 15a).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision creates a rule of law that directly conflicts with the federal substantive law created by the FAA, standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in implementing the FAA. Pursuant to this rule of law, arbitration provisions in contracts with Virginia school boards are rendered completely unenforceable, even where the arbitration provision is governed by the FAA. Petitioner respectfully submits this outcome is in direct conflict with and ignores the Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), as well as the Fourth Circuit's own opinion in *Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990), *cert. denied, Williams v. Saturn Distribution Corp.*, —— U.S. ——, 111 S. Ct. 516, 112 L. Ed. 2d 527 (1990) and the opinion of the Eighth Circuit in *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370 (8th Cir. 1983).

As recognized in *Southland Corp.*, by "enacting [section] 2 of the federal [Arbitration] Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed

to resolve by arbitration." 465 U.S. at 10. In doing so, this Court noted that, "Congress has thus mandated the enforcement of arbitration agreements" and that "contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." 465 U.S. at 7 and 10.

The Court also noted that there are only two limitations on the enforceability of arbitration provisions governed by the FAA. First, such provisions must be in writing and part of a contract, "evidencing a transaction involving commerce"; and second, such clauses may be revoked only upon "grounds as exist at law or in equity for the revocation of *any* contract." 465 U.S. at 10-11 and 16, n.11. [Emphasis added]. There is nothing else in the Act to indicate the "broad principle of enforceability is subject to any additional limitations under state law." 465 U.S. at 11. Further, where state law directly conflicts with Section 2 of the Federal Arbitration Act, it violates the Supremacy Clause of the U.S. Constitution. 465 U.S. at 10.

The instant case raises a preemption issue similar to that raised in *Southland Corp.*[1] Although it does not

---

[1] The instant case is also similar to the unsettled questions of law raised in *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 251 Ga. 15, 303 S.E.2d 1 (1983), *vacated*, 465 U.S. 1016, 104 S. Ct. 1263, 79 L. Ed. 670, *decision on remand*, 253 Ga. 219, 320 S.E.2d 742 (1984). In *Local Division 732*, the Metropolitan Atlanta Rapid Transit Authority ("MARTA") withdrew from binding interest arbitration with the Union contending that under Georgia law arbitration agreements were revocable at will. The Georgia Supreme Court agreed. 251 Ga. at 18-19, 303 S.E.2d at 4.

The U.S. Supreme Court held its ruling on the Union's petition for certiorari until it ruled in *Southland Corp.* It then vacated the Georgia Supreme Court's decision and remanded for reconsideration. 104 S. Ct. 1263. Despite this Court's ruling, the Georgia Supreme Court reentered its earlier judgment, ruling that "MARTA's consent to arbitrate the terms and conditions of a new collective bargaining agreement was an unlawful delegation of legislative

involve a statute, as was the case in *Southland Corp.*, the Fourth Circuit's application of a common law rule of strict statutory construction, results in direct conflict with Section 2 of the Federal Arbitration Act, precluding enforcement of the arbitration clause contained in the parties' contract.

I. VIRGINIA CANNOT NULLIFY THE EFFECT OF THE FEDERAL ARBITRATION ACT ON SCHOOL BOARDS WHERE IT STATUTORILY CONVEYS THE POWER TO CONTRACT BUT IS SILENT ON THE POWER TO AGREE TO A CONTRACT ARBITRATION PROVISION

Virginia Code Section 22.1-71 defines the general powers and duties of school boards, as follows:

> Every such school board is declared a body corporate and, in its corporate capacity, is vested with all the

---

authority" because it exceeded MARTA's statutory authority. 253 Ga. at 222, 320 S.E.2d at 745. In doing so, the Georgia Supreme Court believed that the state's restriction on public body arbitration agreements fell within the exception in Section 2 of the FAA for defenses "applicable to all other contracts." 253 Ga. at 223, 320 S.E.2d at 745.

Much like the Fourth Circuit reasoned in the instant case, the Georgia Supreme Court reasoned that absent an express grant of statutory authority to agree to arbitration provisions, despite the existence of the statutory power to contract, the arbitration provision within the agreement was unenforceable because it constituted an unlawful delegation of authority, which was a general contract defense under the "savings clause" in Section 2 of the FAA. Before this controversy between the Georgia Supreme Court and the U.S. Supreme Court could ultimately be resolved, the parties settled their case.

Unquestionably, the lack of explicit authority to agree to arbitration (despite the authority to contract) is not a ground that exists at law or in equity "for the revocation of *any* contract." 465 U.S. at 16, n.11. Rather, as in *Southland Corp.*, and as in this case, it is "merely a ground that exists for revocation of arbitration provisions in contracts" with Virginia school boards, which is in direct conflict with and is preempted by the FAA. 465 U.S. at 16, n.11.

> powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law and may sue, be sued, contract, be contracted with . . . .

The plain language of this statute gives to school boards the power to contract in a corporate capacity as well as the power to sue and be sued. This power implicitly includes the power to agree to arbitration provisions within such contracts. The Fourth Circuit's decision to the contrary, based on erroneous application of the "Dillon Rule" of strict statutory construction, is illogical and ignores the fact that the purpose of the Federal Arbitration Act is to place arbitration agreements "upon the same footing as other contracts, where [they] belong." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (2985) (*citing: H.R. Rep. No. 96*, 68th Cong. 1st Sess. 1 (1984)). *See also, Southland Corp. v. Keating*, 465 U.S. 1, 17 n.11 continued, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

The issue of whether the power to arbitrate contract disputes may be implied from the power to contract (granted to quasi public corporations, such as Virginia school boards) was decided almost 100 years ago by this Court in *District of Columbia v. Bailey*, 171 U.S. 161, 18 S. Ct. 868 (1897). The *Bailey* Court squarely addressed application of the "Dillon Rule" on this issue, stating:

> So, also, the power of a municipal corporation to arbitrate arises from its authority to liquidate and settle claims, and the rule on this subject is thus stated by Dillon (Mun. Corp. 4th ed. sec. 478):
>
> 'As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, *unless disabled by positive law*, could

> submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities.' [Emphasis added].

171 U.S. at 172.

The *Bailey* Court then went on to reason:

> In the early case of *Brady v. Brooklyn*, 1 Barb. 584, 589, the power of a municipal corporation to submit to arbitration was ascribed to the capacity to contract, with a liability to pay, and it was held that corporations have all the powers of ordinary parties as with respect to their *contracts*, except when they are *restricted expressly*, or by necessary implication. In the case of minor public officials or corporations, such as selectmen *and school districts*, the power to arbitrate has been clearly rested upon the existence of the right to adjust and settle claims of the particular character which had been submitted to arbitration. *Dix v. Dummerston*, 19 Vermont 262; *Walnut v. Rankin*, 70 Iowa 65. Indeed, the proposition that an independent agreement to submit to an award must depend for its validity *upon the existence of the right to contract* is so elementary that further citation of authority to support it is unnecessary. [Emphasis added].

171 U.S. at 172.

Citing *Bailey*, the Eleventh Circuit in *City of Atlanta v. Brinderson Corp.*, 799 F.2d 1541 (11th Cir. 1986), recognized:

> The general rule is that, *in the absence of statutory prohibition*, a municipal corporation has the power to submit both present and future disputes to arbitration. Annot. 20 A.L.R. 30, 569, 572 (1968) Am. Jur. 2d, Arbitration and Award, Section 68 pp. 659-571 (1962). Such a power is *incident to its capacity to contract* or make settlements, and *its power to sue and be sued. See, generally, McQuillin*, 17 Mun. Cor.

> Section 48.20 (3rd Ed.); *City of Hartford v. American Arbitrators Ass'n.*, 174 Conn. 472, 391 A.2d 137 (1978); *E.E. Trip Excavating Contractor, Inc. v. The County of Jackson, Michigan*, 60 Mich. App. 221, 230 N.W.2d 556 (1975). [Emphasis added].

799 F.2d at 1543.[2]

Based on this sound reasoning, the *Brinderson* court held that with respect to the City of Atlanta:

> [Their] power to arbitrate is ascribed to the capacity to contract. Accordingly, the City has the incident and necessarily implied power to arbitrate.

799 F.2d at 1543. *See also, County of Middlesex v. Gevyn Constr. Corp.*, 450 F.2d 53, 55 (1st Cir. 1971), *cert. denied, County of Middlesex v. Gevyn Constr. Corp.*, 405 U.S. 955, 92 S. Ct. 1176, 31 L. Ed. 232 (1972) (county recognized to have implied power to arbitrate contract claims based on its power to contract).[3]

---

[2] The Supreme Court of Utah reached the same conclusion in *Lindon City v. Engineers Construction Co.*, 636 P.2d 1070, 1074 (Utah 1981). Citing the Supreme Court of Washington in *King County v. Boeing Co.*, 18 Wash. App. 595, 570 P.2d 713, 717 (1977), the *Lindon* court acknowledged that:

> Arbitration is a contractual remedy for the settlement of disputes by extrajudicial means. It is a remedy freely bargained for by the parties, and 'provides a means of giving effect to the intention of the parties, easing court congestion, and providing a method more expeditious and less expensive for the resolution of disputes.' There is a strong public policy in favor of such remedy. . . .

The *Lindon* court further reasoned that:

> There appears to be no 'public policy' or other good reason why persons effectively and by contract, should not be able to agree to an out-of-court settlement.
>
> * * * *
>
> The trend toward such *inter se* agreements without resort to litigation, reflects a good, practical way to resolve disputes.

636 P.2d at 1073.

[3] Numerous state supreme courts have also concluded that the power of municipal and/or quasi public corporations to arbitrate

The Fourth Circuit's holding, therefore, on the issue of whether Virginia school boards have the power to agree to arbitrate is clearly in error. The Fourth Circuit's application of the Dillon Rule defies logic, the Dillon Rule itself and well established law. It also nullifies the import and effect of the Federal Arbitration Act, which attempts to place arbitration agreements on the same footing as contracts, where they belong. *See, Dean Witter Reynolds, Inc., supra*, 470 U.S. at 219.

II. THE RULE OF LAW CREATED BY THE FOURTH CIRCUIT'S APPLICATION OF THE DILLON RULE IN THIS CASE DIRECTLY CONFLICTS WITH SECTION 2 OF THE FEDERAL ARBITRATION ACT, IN VIOLATION OF THE SUPREMACY CLAUSE

In specifically addressing the preemption issue, the Fourth Circuit stated that the Dillon Rule, "is a rule of general applicability that defines and invalidates all *ultra vires* acts of local governing bodies." 980 F.2d at 259. The court concluded, therefore, "as 'a general rule of contract formation,' it constitutes a 'ground as exist[s] at law or in equity for the revocation of any contract,' within the meaning of 9 U.S.C. Section 2 [and] as such, it falls within the exception to Section 2's general rule of enforceability of arbitration provisions, and therefore is not preempted by the FAA [citations omited]." 980 F.2d at 259.

In reaching this conclusion, the court failed to recognize the distinction between a rule of statutory construction (such as the Dillon Rule) and the result that may flow from application of the rule. While the Dillon Rule, *by itself*, is not subject to preemption, the *result* flowing from the court's misapplication of the Dillon Rule in this case is subject to preemption. Essentially, the Court's

---

is implied from their power to contract, sue and be sued. *See, generally*, Annotation, 20 A.L.R. 3d 569, *Power of Municipal Corporation to Submit to Arbitration.*

reasoning process in this case creates a rule of law that *goes solely to the arbitration provision* in the School Board's contract *and not to contracts, generically*, as contemplated by 9 U.S.C. Section 2. Further the preemption issue created by the end result stemming from this rule of law cannot be avoided by the court merely saying the Dillon Rule is simply a "rule of general applicability."

The Fourth Circuit's decision in this case is also completely inconsistent with their decision in *Saturn Distribution Corp. v. Williams*, 905 F.2d 917 (4th Cir. 1990), *cert. denied, Williams v. Saturn Distribution Corp.*, —— U.S. ——, 111 S. Ct. 516, 112 L. Ed. 2d 527 (1990). In *Saturn*, Judges Chapman and Wilkinson recognized with respect to 9 U.S.C. Section 2 that, "with few limitations, if a state law singles out arbitration agreements and limits their enforceability it is preempted."[4] As stated in *Saturn*:

> State laws are subject to preemption not only if they directly contradict federal law, but also if they stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation omitted]. The language of the FAA requires that states place no greater restrictions upon arbitration provisions than they place upon other contractual terms.
>
> * * * *
>
> The Commissioner argues that the scope of FAA preemption is limited to laws covering existing arbitration agreements, and does not extend to laws that prohibit or regulate the *formation* of arbitration agreements. We disagree. [Emphasis in original].

905 F.2d at 722-723.

The result flowing from the Fourth Circuit's misapplication of the Dillon Rule in this case, however, creates

---

[4] The Court proffered as possible exceptions, "fraud or the sort of overwhelming economic power which can render an agreement unconscionable." 905 F.2d at 727.

precisely such a rule of law in Virginia as applied to arbitration provisions in contracts with local school boards. Under *Southland Corp.* and *Saturn* preemption would only occur, using the Dillon Rule, where a school board did not have the power to contract and the power to sue and be sued in the first instance. Then, and only then, would the Dillon Rule fall within the savings clause in section 2 of the FAA as a defense applicable to *all* contracts.

Even more troubling, however, is the notion that the Fourth Circuit's decision will allow the state to do by silence what it cannot do by statute. For example, if Virginia Code Section 22.1-71 granted school boards the power to contract but expressly provided that, "arbitration provisions to resolve contractual disputes, contained in such contracts, are unenforceable," then under *Southland Corp. v. Keating*, 465 U.S. 1, 16-17, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), such a statute would be preempted.[5]

Since, however, Virginia Code Section 22.1-71 is silent as to arbitration (although it includes the power to contract and to sue and be sued) the Fourth Circuit permits the Dillon Rule of strict construction to revoke and render

---

[5] The Missouri Court of Appeals recognized this logic in *Boogher v. Stifel*, 825 S.W.2d 27, 29 (Mo. 1992). In *Boogher*, the plaintiff argued his claims under the Missouri Human Rights Act were not arbitrable because the Federal Age Discrimination in Employment Act, did not expressly provide for arbitration. Citing *Southland Corp.*, the *Boogher* Court reasoned that, "a state law which attempts to preclude enforcement of an arbitration agreement in a contract involving interstate commerce would be in conflict with the FAA and, therefore, in violation of the supremacy clause." 825 S.W.2d at 29. Thus, the *Boogher*, Court concluded:

> Plaintiff's argument is flawed because the Missouri Legislature could not enact a provision of the MHRA which precludes arbitration without violating the supremacy clause. Under the FAA, plaintiff's age discrimination suit brought under the MHRA is subject to compulsory arbitration pursuant to his agreement.

825 S.W.2d at 29.

unenforceable the arbitration clause contained in the parties' contract. This *result* is not only illogical but it allows contravention of the Federal Arbitration Act despite the fact that the Act constitutes, "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983). *See also, Southland Corp., supra*, 465 U.S. at 16 ("In creating a substantive rule applicable in state as well as federal courts congress intended to foreclose state . . . attempts to undercut the enforceability of arbitration agreements").

When confronted with a similar situation, the Eighth Circuit Court of Appeals in *Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 376 (8th Cir. 1983) rejected contravention of the Federal Arbitration Act, applying federal substantive law over state law. In *Johnson Controls* the city's contentions, which are not unlike the School Board's contentions in this case, were rejected by the court:

> The city claims that at the time this contract was entered into, Iowa law rendered executory arbitration agreements generally unenforceable. [Citations omitted]. Iowa law also provides that municipalities are without power to make contracts that are inconsistent with state law. [Citations omitted]. Thus, the city asserts that if the contract is construed as providing for mandatory arbitration, the contract would be *ultra vires* and void under Iowa law.
>
> * * * *
>
> The city's argument is misplaced. The arbitration act was specifically enacted to reverse antiquated state rules of law that make arbitration agreements revocable at will any time prior to the issuance of the arbitration award. [Citations omitted] Because federal substantive law preempts state laws govern-

> ing the enforceability of arbitration agreements in interstate contracts, the present contract is not unenforceable under applicable federal law. Hence, construing the contract as providing for mandatory arbitration would not be against controlling federal public policy. To the contrary, federal policy favors arbitration in interstate contracts.

713 F.2d at 376.

Pursuant to this Eighth Circuit decision, a state law relating to contract formation which would render an arbitration provision *ultra vires* and void (as the court construed the Dillon Rule in this case) is preempted by federal substantive law created by the Federal Arbitration Act. Further, as recognized in *Johnson Controls*, even if a state law prohibits a municipal corporation from entering into an arbitration agreement, the Federal Arbitration Act displaces the state's power over the activities of two parties in interstate commerce. 713 F.2d at 381. Based on this reasoning, the Fourth Circuit's decision in the instant case results in inconsistency with the Eighth Circuit's decision in *Johnson Controls*.

Although predating the U.S. Supreme Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (1984), the court's rationale in *Johnson Controls* accords completely with the court's decision in *Southland Corp.* As recognized by the *Southland Corp.* Court, in enacting Section 2 of the Federal Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration. 465 U.S. at 12-13. Certainly, the Fourth Circuit's application of the Dillon Rule in the instant case to require a judicial forum notwithstanding the arbitration clause contained in the parties' contract is contrary to not only the purpose and intent of the Federal Arbitration Act but also the law as stated by the United States Supreme Court.

CONCLUSION

The Fourth Circuit's decision in this case not only ignores this Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) and the Supremacy Clause of the U.S. Constitution, it also creates precedent which substantially erodes federal substantive law created by the Federal Arbitration Act. By allowing a state rule of statutory construction to stand as a complete obstacle to the enforcement of an arbitration provision, the Fourth Circuit is permitting states to accomplish by silence that which they cannot accomplish by express statute. Federal substantive law requires the enforcement of an arbitration provision where, as in this case, they are part of a contract which involves interstate commerce. To the extent a state rule of statutory construction precludes enforcement of such an arbitration provision, then its application violates the Supremacy Clause of the U.S. Constitution and it is preempted by the Federal Arbitration Act. In order to avoid inconsistent decisions between the circuits and to provide guidance for parties invoking the Federal Arbitration Act in state court proceedings, it is important for this Court to finally address and resolve the significant issue raised by this case, which involves conflicting federal substantive law and state law with respect to the validity and enforceability of a contract arbitration provision.

Respectfully submitted,

HERMAN M. BRAUDE
Counsel of Record

ROGER C. JONES
BRAUDE & MARGULIES, P.C.
1025 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 293-2993
Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 92-1008

W.M. SCHLOSSER COMPANY, INCORPORATED,
Plaintiff-Appellant,

v.

SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA,
Defendant-Appellee.

Argued Sept. 29, 1992

Decided Nov. 18, 1992

As Amended Jan. 13, 1993

Herman Martin Braude, Braude & Margulies, P.C., Washington, D.C., argued (Roger C. Jones, on brief), for plaintiff-appellant.

Thomas John Cawley, Hunton & Williams, Fairfax, Va., argued (Stuart A. Raphael, on brief), for defendant-appellee.

Before PHILLIPS, NIEMEYER, and LUTTIG, Circuit Judges.

OPINION

LUTTIG, Circuit Judge:

The W.M. Schlosser Company appeals an order of the district court denying its motions to compel arbitration and to appoint an arbitrator to resolve its construction

contract dispute with the School Board of Fairfax County, Virginia. We conclude that regardless of whether the School Board agreed to arbitrate the dispute in question, it lacked the legal authority to arbitrate under the laws of the Commonwealth of Virginia. We therefore affirm.

I.

The relevant facts necessary to the disposition of this appeal are not in dispute. On June 10, 1988, the W.M. Schlosser Company [Schlosser], a Maryland corporation, entered into a contract with the Fairfax County School Board [the School Board] for the performance of renovation construction at the Falls Church High School. The contract comprised a number of documents, the most important of which were two standard construction forms prepared by the American Institute of Architects, the AIA Standard Agreement and the AIA General Conditions, and a set of Supplementary Conditions that included extensive modifications to the terms of the AIA standard forms. J.A. at 5-41.

The AIA General Conditions provide for the arbitration of claims arising under the contract. Article 2.2.7 of the General Conditions stipulates that all disputes between contractors and owners must first be referred to the project architect for an initial decision.[1] *Id.* at 14. Article 2.2.10 states that "[a]ny claim, dispute or other matter that has been referred to the Architect . . . shall be subject to arbitration upon the written demand of either party." *Id.* Finally, Article 7.10, entitled "ARBITRATION," provides that all contract disputes shall be arbitrated in accordance with the Construction Industry Arbitration Rules of the AIA and outlines the arbitration process. *Id.* at 20. In the Supplementary Conditions portion of the contract, Schlosser and the School Board left

[1] Under Article 2.2.2 of the General Conditions, the project architect is the agent and representative of the owner, which in this case is the School Board. J.A. at 14.

Articles 2.2.7 and 2.2.10 unchanged. *Id.* at 27. They deleted Article 7.10 of the AIA General Conditions, however, in its entirety. *Id.* at 30.[2]

Prior to completion of the Falls Church High School project, Schlosser alleged that it had been delayed in the performance of its contract obligations by the School Board, and on August 3, 1990, it served the Board with a claim for damages in the amount of $1,152,941. Schlosser submitted a copy of the claim to the project architect for an initial adjudication, pursuant to Article 2.2.7 of the General Conditions. *Id.* at 3. Several months later, the architect granted Schlosser a short extension of the time within which it was required to complete its work, but denied Schlosser's damages claim. *Id.* at 75-79.

On March 27, 1991, Schlosser presented the Board with a written demand for arbitration pursuant to Article 2.2.10 of the General Conditions. The following day, invoking the court's diversity jurisdiction, Schlosser moved in the district court to compel arbitration and to designate and appoint an arbitrator under the terms of the Federal Arbitration Act [FAA], 9 U.S.C. §§ 1 *et seq.* Schlosser's petition was referred to a federal magistrate who, after conducting a hearing, denied both of Schlosser's motions on the ground *inter alia* that the School Board lacked the authority to arbitrate under Virginia law and thus that any attempt by the Board to contract to arbitrate was unenforceable. J.A. at 103, 105.

Schlosser appealed the magistrate judge's decision to the district court.[3] The district court adopted the magis-

---

[2] The director of design and construction services for the school system stated in his declaration that because "neither the [School Board] nor any of its agents has the authority to enter into arbitration agreements," "it is the custom and standing practice of Fairfax County Public Schools to eliminate standard form arbitration provisions contained in construction contracts." Hanton Decl., J.A. at 70.

[3] Schlosser initially appealed the magistrate's decision to this court. We dismissed the appeal for lack of jurisdiction. *W.M. Schlosser Co. v. Fairfax County Sch. Bd.*, No. 91-2515 (4th Cir. Aug. 2, 1991).

trate's recommendations, holding that the Board had no authority under Virginia law to arbitrate contract disputes. *Id.* at 125-26. This appeal followed.[4]

II.

A.

The question before the court is whether the School Board possesses the authority under the laws of the Commonwealth of Virginia to agree to arbitrate contractual disputes, for if it does not, then any such agreement by the Board is unenforceable as *ultra vires* and the motion to compel arbitration therefore must be denied. *See Richmond Ry. Co. v. Richmond, Etc.*, 145 Va. 266, 299, 133 S.E. 888, 898 (1926) ("When the contract is once declared *ultra vires*, the fact that it is executed does not validate it, nor can it be ratified so as to make it the basis of suit or action, nor does the doctrine of estoppel apply."); *accord Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 299 S.E.2d 346 (1983). The resolution of this question depends in turn upon application of the Dillon Rule, a rule of construction applicable in Virginia when determining the powers of local government: "There can be no question that Virginia long has followed, and still adheres to, the Dillon Rule of strict construction concerning the powers of local governing bodies." *Commonwealth v. County Bd.*, 217 Va. 558, 232 S.E.2d 30, 40 (1977).[5]

---

[4] The district court also held that Schlosser and the Board had not agreed to arbitrate disputes arising out of their contract. Because we agree with the district court that the Board lacked the authority to arbitrate contract disputes, we need not and do not reach this question of contract interpretation.

[5] The Virginia Supreme Court first recognized the Rule—sometimes referred to as Dillon's Rule—in *Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896). The Rule takes its name from John F. Dillon, a federal circuit judge, chief justice of the Iowa Supreme Court, and noted law professor. *See infra* note 6.

According to the Dillon Rule, local governing bodies such as counties, municipal corporations, and school boards "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."[6] *City of Richmond v. Confrere Club*, 239 Va. 77, 387 S.E.2d 471, 473 (1990) (citing cases); *County Bd. v. Brown*, 229 Va. 341, 329 S.E.2d 468, 470 (1985); *see also School Bd. v. Burley*, 225 Va. 376, 378, 302 S.E.2d 53, 55 (1983) ("A school board may exercise only the power granted it by the General Assembly."); *Kellam v. School Bd.*, 202 Va. 252, 117 S.E.2d 96, 98 (1960) (school boards "constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other"). The Rule is strictly construed and strictly enforced by the Virginia Supreme Court and the court does not liberally recognize governmental powers by implication. *See Brown*, 329 S.E.2d at 472 (power to lease realty cannot be implied from county's express power to sell or convey realty); *Commonwealth v. County Bd.*, 232 S.E.2d at 44 (power to bargain collectively cannot be implied from expressly granted powers of school boards to contract, hire employees, and set terms of employment). Significantly, "[i]f there is *any* reasonable doubt whether legislative power exists, that doubt *must* be resolved against the local governing body." *Confrere Club*, 387 S.E.2d at 473 (em-

---

[6] *See Winchester*, 93 Va. at 714, 25 S.E. at 1002 (*quoting* 1 Dillon on Mun. Corp. § 89 (3d ed.)):

> a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; Second, those necessarily or fairly implied in or incident to the powers expressly granted; Third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

phases added); *accord Stallings v. Wall*, 235 Va. 313, 316, 367 S.E.2d 496, 497 (1988).

B.

Schlosser and the School Board agree that the state constitution does not expressly confer the power to arbitrate on Virginia school boards. Both parties also appear to agree that such a power cannot be considered "essential" or "indispensable" to the functioning of school boards. Therefore, if the power to agree to arbitrate is not expressly granted by statute or cannot be implied from a power explicitly conferred on school boards by the General Assembly, it does not exist.

Schlosser contends that the authority to agree to arbitrate is conferred in section 22.1-71 of the Virginia Code. That statute, which lists the corporate powers of the Commonwealth's school boards, provides that every

> school board is . . . vested with all the powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law and may sue, be sued, *contract*, be contracted with and, in accordance with the provisions of this title, purchase, take, hold, lease and convey school property. . . .

Va.Code Ann. § 22.1-71 (Michie 1985) (emphasis added). Schlosser asserts that because the School Board has the "capacity to contract, [it] . . . clearly has the power to enter into construction contracts containing arbitration provisions for the resolution of claims relating to the contract." Appellant's Br. at 10-11.[7]

It is not entirely clear whether Schlosser contends that the grant of the power to contract in section 22.1-71 is an express conferral of the power to agree to arbitrate or

---

[7] Alternatively, Schlosser contends that the authority to arbitrate may be implied from that portion of section 22.1-71 that grants school boards the power to sue and be sued. Appellant's Br. at 13, 16. *See infra* note 10.

whether it contends that the power to arbitrate is implied in the power to contract. While neither contention is without force, ultimately each fails. Both the Public Procurement Act, Virginia Code §§ 11-35 *et seq.*, and section 15.1-508 of the Virginia Code confirm that the Virginia General Assembly does not consider the grant of a right to contract as expressly conferring a right to agree to arbitrate. It is also evident from these statutes, especially when they are construed strictly as required by the Dillon Rule, that we are not at liberty to imply such a right from the School Board's right to contract.

C.

The Public Procurement Act, which governs the procurement of goods and services by counties, cities, towns, and school divisions from nongovernmental sources, sets forth procedures for resolving contract disputes between public entities and private contractors. Section 11-69 of the Act requires in relevant part that "[e]ach public body . . . include in its contracts a procedure for consideration of contractual claims," and mandates that "[t]he decision of the public body shall be final and conclusive unless the contractor appeals. . . ." Appeal of the final decision of the public body is limited to the "[invocation of] administrative procedures meeting the standards of § 11-71, if available, or in the alternative [to] institut[ion] [of] legal action [in the appropriate state court]." Va.Code Ann. § 11-69 D. (Michie 1985).[8] Thus, under section 11-69 D., contract disputes are to be decided by the public body itself, with appeal available only through the public body's administrative appeal procedure, if one exists, or to the courts. There is no provision for the dispute to be decided either initially or on appeal by an

[8] Section 11-71 allows, but does not require, public bodies to "establish an administrative procedure for hearing . . . appeals from decisions on disputes arising during the performance of a contract." Apparently, the School Board has not adopted any such procedure.

arbitrator. Indeed, the Act would appear to prohibit, by negative inference, decision by an arbitrator, who by definition is neither a representative of the public body nor a court of law.[9]

The fact that the General Asssembly does not provide for arbitration in the very statute in which it prescribes the methods for public contract dispute resolution, we believe, is persuasive evidence that the Assembly does not regard the right to contract as expressly encompassing the right to agree to arbitrate. If the Assembly believed that the right to contract expressly subsumed such a right, arbitration almost certainly would be included in section 11-69 D. as one means by which contract disputes could be resolved.

Our conclusion that the General Assembly does not consider the right to contract as encompassing such a right is reinforced by the recent amendment of section 15.1-508 of the Virginia Code to provide expressly that counties may agree to arbitrate. In 1987, notwithstanding that county officials had long been authorized to contract by section 15.1-105 of the Virginia Code, the Assembly amended section 15.1-508 to include the following express right to agree to arbitrate: "The governing body of a county may enter into a written agreement to submit any existing controversy to arbitration *and may*

---

[9] Schlosser argues that the arbitration provision assertedly embodied in its contract with the School Board satisfies the requirement in section 11-69 B. that "each public body shall include in its contracts a procedure for consideration of contractual claims." *See* Appellant's Br. at 14-15. We disagree. Section 11-69 B. clearly contemplates that the initial decision of any dispute will be rendered by the public body. *See* section 11-69 D. ("*The decision of the public body* shall be final and conclusive unless the contractor appeals. . . .") (emphasis added). This requirement would appear to be satisfied, however, by the procedure outlined in Article 2.2.7 of the General Conditions, which provides that contract disputes are to be submitted initially to the project architect, given that the architect is the School Board's agent.

execute a contract which contains a provision to submit to arbitration any controversy thereafter arising." 1987 Va. acts c. 483 (emphasis added). This amendment obviously would have been unnecessary if the legislature believed that the power to contract conferred in section 15.1-105 expressly included the power to arbitrate.

Finally, our conclusion that the power to contract does not by definition include the power to agree to arbitrate is consistent with decisions of the highest court in Virginia to have considered the question. *See Hanover County Sch. Bd. v. Gould*, (Hanover Cty.Cir.Ct. C-23-1984, Apr. 4, 1984) (holding, on state constitutional grounds, that school boards lack authority to arbitrate); *cf. Spotsylvania County Sch. Bd. v. Sherman Constr. Corp.*, 14 Va.Cir. 333 (1989) (implicitly assuming that right to agree to arbitrate not expressly conferred in right to contract); *Spotsylvania County Sch. Bd. v. R.E. Lee & Son, Inc.*, 5 Va.Cir. 48 (1982) (same). *But cf. McKennie v. Charlottesville & Albemarle Ry.*, 110 Va. 70, 78, 65 S.E. 503 (1909) (municipality's power to settle and compromise claims is "a necessary incident to its right to contract and to sue and be sued").

Together, the Public Procurement Act, the amendment to section 15.1-508, and the Virginia authority cited, are convincing evidence that school boards have not been expressly accorded the power to arbitrate through the power to contract in section 22.1-71.

D.

Whether the power to arbitrate may be implied from the power to contract is another question, but one which we also believe must be answered in the negative. The Virginia Supreme Court has consistently rejected claims to implied power, absent compelling evidence that the General Assembly intended that such power be implicit in a power enumerated. *See Commonwealth v. County Bd.*, 232 S.E.2d at 42 ("In questions of implied power, the

answer is to be found in legislative intent. To imply a particular power from a power expressly granted, it *must* be found that the legislature intended that the grant of the express also would confer the implied." (emphasis added)).

Schlosser has offered no evidence that the General Assembly intended for school boards to have the right to arbitrate, much less that it intended for such a right to be implied from the right to contract. Indeed, we believe that the legislature's amendment of section 15.1-508 to confer expressly upon counties the power to agree to arbitrate disputes, without a corresponding amendment to section 22.1-71 to accord school boards the same power, "demonstrates a clear legislative intent to withhold from" school boards such power.[10] *See Brown*, 329 S.E.2d at 472 (inferring legislative intent to withhold from counties the power to lease government property from fact that municipal corporations, but not counties, had been granted a general power to lease property); *Commonwealth v. County Bd.*, 232 S.E.2d at 42-44 (power to bargain collectively would not be implied from school boards' express powers to contract, hire employees, and set the terms of their employment where legislature had selectively enacted legislation authorizing collective bargaining but had consistently rejected general authorizing legislation).[11] This intention is underscored by the fact

---

[10] Prior to its amendment in 1987, section 15.1-508 only authorized counties to sue and be sued. A reasonable inference to be drawn from the fact that the legislature amended this statute so as to expressly permit counties to arbitrate is that the legislature did not believe that the power to arbitrate could be implied from the power to sue and be sued. Schlosser's alternative argument that the authority to arbitrate may be implied from section 22.1-71's express grant to school boards of the power to sue and be sued, *see supra* note 7, therefore, also fails.

[11] *Cf. Tabler v. Board of Supervisors*, 221 Va. 200, 269 S.E.2d 358 (1980) (county's claimed power to require a minimum cash refund value on non-alcoholic beverage containers would not be implied where General Assembly had repeatedly rejected bills authorizing

that the Public Procurement Act, as discussed *supra*, itself appears to forbid arbitration. *See Sherman Constr. Corp.*, 14 Va.Cir. at 339 ("[T]he contention that local school boards possess an implied power to submit construction contract disputes to binding arbitration clashes with the express provisions of the [Public Procurement] Act.").[12]

Even if we were not convinced that the Virginia legislature does not intend for school boards to have the right to arbitrate contractual disputes, we would still hold that such a right cannot be implied. At the very least, the amendment to section 15.1-508, the terms of the Public Procurement Act, and the recited caselaw collectively raise a reasonable doubt as to whether Virginia school boards possess the authority to execute contracts containing arbitration provisions. The Dillon Rule, as noted, requires that any reasonable doubt over whether a particular power exists be resolved against its existence.

Accordingly, because the Virginia General Assembly has not expressly conferred upon school boards the power to arbitrate, and because such a power cannot, under the Dillon Rule, be implied from the express power to contract, we hold that the School Board lacked the legal authority to agree to a binding arbitration provision in its contract with Schlosser. Any agreement to arbitrate, therefore, was unenforceable.

III.

Schlosser, perhaps anticipating our holding, contends that the Federal Arbitration Act preempts application of

---

regulation of beverage containers); *see also Deal*, 299 S.E.2d at 347-49 (Commonwealth could not be bound to arbitration agreement by its agents absent specific legislation authorizing such agents to submit disputes to arbitration).

[12] *R.E. Lee & Son*, *supra*, summarily concluded otherwise, but without citation to authority and without discussion of the limited avenues for dispute resolution authorized in the Public Procurement Act.

the Dillon Rule.[13] It argues that any state law, such as the Dillon Rule, that prohibits enforcement of an arbitration agreement runs afoul of the FAA because the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), which requires that federal courts "rigorously enforce agreements to arbitrate," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1243, 84 L.Ed.2d 158 (1985). This argument is unavailing.

The FAA does embody "a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984). This policy is enunciated broadly in section 2 of the FAA, which provides in pertinent part that

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphases added). And we have held that "[t]he language of [section 2] requires that states place *no greater* restrictions upon arbitration provisions than they place upon other contractual terms," and that generally, "if a state law *singles out* arbitration agreements and limits their enforceability it is preempted." *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722 (4th Cir.) (emphasis added; footnote omitted), *cert. denied*, ——— U.S. ———, 111 S.Ct. 516, 112 L.Ed.2d 527 (1990). In *Saturn*, for example, we invalidated a provision of the Virginia Motor Vehicle Dealer Licensing Act which prohibited automobile manufacturers and dealers from entering into agreements that included mandatory alternative

---

[13] "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . ." U.S. Const. Art. VI, cl. 2.

dispute resolution provisions. We held that the provision was preempted by the FAA because it "single[d] out arbitration clauses and unreasonably burden[ed] the ability to form arbitration agreements." 905 F.2d at 723.

The Dillon Rule, however, does not single out and disproportionately burden arbitration provisions. It is a rule of general applicability that defines and invalidates all *ultra vires* acts of local governing bodies. Unlike the provision drawn into question in *Saturn*, the Rule is not "an idiosyncratic rule specific to arbitration agreements," but is instead "merely an unremarkable part of Virginia's general laws of contract formation." *Id.* at 725. As "a general rule of contract formation," *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir.1979), it constitutes a "ground[] as exist[s] at law or in equity for the revocation of any contract," within the meaning of 9 U.S.C. § 2. As such, it falls within the exception to section 2's general rule of enforceability of arbitration provisions, and therefore is not preempted by the FAA. *See Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 2527 n. 9, 96 L.Ed.2d 426 (1987) (under the FAA, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original); *Supak*, 593 F.2d at 137 ("Section 2 [of the FAA] dictates the effect of a contractually agreed-upon arbitration provision, but it does not displace state law on the general principles governing formation of the contract itself.").

IV.

For the reasons set forth, the appellant's motions to compel arbitration and to appoint an arbitrator were properly denied. The decision of the district court is therefore affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1008

W. M. SCHLOSSER COMPANY, INCORPORATED,
Plaintiff-Appellant

v.

SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA,
Defendant-Appellee

[Filed December 16, 1992]

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellant has filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with sugtion for rehearing in banc.

Entered at the direction of Judge Luttig, with the concurrence of Judge Phillips and Judge Niemeyer.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1008
CA-91-4-M

W M SCHLOSSER CO INC

v.

SCHOOL BOARD

[Filed December 23, 1992]

MANDATE

The judgment of this Court dated 11/18/92 takes effect today.

BERT M. MONTAGUE
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 91-0004-M

W. M. SCHLOSSER CO., INC.,
Plaintiff,

v.

THE COUNTY SCHOOL BOARD OF FAIRFAX, VIRGINIA,
Defendant.

ORDER

This matter came before the Court on the plaintiff's appeal of the Magistrate Judge's order of April 5, 1991. For reasons stated from the bench, it is hereby

ORDERED that the decision of the Magistrate Judge is AFFIRMED.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
December 13, 1991

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

C.A. No. 91-4-M

W. M. SCHLOSSER CO., *et al.*,

-vs-

THE COUNTY SCHOOL BOARD OF FAIRFAX COUNTY,
Defendant.

HEARING ON MOTIONS

December 13, 1991

Before: Claude M. Hilton, Judge

APPEARANCES:

Roger C. Jones, Counsel for the Plaintiff

Thomas J. Cawley, Counsel for the Defendant

[2] THE CLERK: Civil action 91-4-M, William Schlosser Company, Inc. versus the County School Board of Fairfax County, of Fairfax, Virginia, I am sorry. This matter comes on for motions.

Are counsel ready, please?

MR. JONES: Good morning, Your Honor. My name is Roger Jones, and I represent the petitioner, William Schlosser Company.

After somewhat of a circuitous journey, this matter comes before you on appeal from Magistrate Brinkema's order denying the petition to compel arbitration under the Federal Arbitration Act. There is really two issues in this appeal. The first issue is whether the contract in question contains an arbitration provision. And the second issue involves whether the school boards in Virginia have the power to enter into contracts containing arbitration provisions. And I would like to take them one at a time.

On the first issue, a little background. Schlosser is a general contractor in Maryland, and they entered into a lump sum contract with the County School Board here in Fairfax to do some renovation work on the Falls Church High School. That contract was a 1974 AIA modified standard form contract. And it contained in Article 2.2.7 a requirement that claims and disputes relating to the execution or progress of the work be submitted to the architect for his [3] decision. In Article 2.2.10 of the contract it said the architects, those claims and disputes would be subject to arbitration.

I think the conflict here with this issue stems from the fact that Article 7.10 of the contract involving the procedure for arbitration which was to be conducted at the American Arbitration Association under the standard form AIA agreement was deleted in the supplementary conditions to the contract. Basically the supplementary conditions said delete the content of Article 7.10. It did not say, delete the arbitration requirement. And it did not say, this contract is not subject to arbitration.

THE COURT: But it did say that there would be no damages to be recovered for delay.

MR. JONES: Well—

THE COURT: That is right behind the leading—

MR. JONES: That issue, Your Honor, I think is an issue that is not an issue in this petition. This is a petition to compel arbitration, not a hearing on the merits of the case itself.

THE COURT: Why would that be a hearing on the merits? I mean, if you found the contract provided you couldn't recover the damages asked for in your complaint, you wouldn't send the case to arbitration, would you?

MR. JONES: The arbitrators would have the ultimate [4] decision-making authority to decide whether the damages claimed by petitioner in an arbitration forum were appropriate and proper, not the Court. The arbitration agreement would divest the Court of deciding the merits of the case, and it would be for the arbitrators to decide.

That's what agreements to arbitrate are all about. And that's what the Federal Arbitration Act is all about, liberally construing agreements to arbitrate.

THE COURT: I don't disagree with what you are saying the law is. But I find it difficult to believe that if you have got a contract that says you can't get damages at all, that you then appoint an arbiter and send that to arbitration for them to determine a contract.

MR. JONES: Well, as Your Honor probably knows, there are numerous exceptions to what we call the no damage for delay clause in the contract. A recent one in this court which recognizes some of those exceptions, such as those involved with amounts of interference with the contractor's work, bad faith and fraud. And at the arbitration hearing those are all issues that could be delved into and presented to the arbitrators factually for the arbitrators to determine whether the no damage for delay clause is enforceable or not enforceable.

THE COURT: All right.

MR. JONES: I would submit to the Court that the [5] agreement in this particular action is complete on its face, it is unambiguous. There is an arbitration provision. I think the School Board recognizes the contract contains an arbitration provision, although they characterize it as an accidental reference left in the contract.

The second issue involves whether school boards have the power to enter into contracts containing arbitration provisions, if you will. And the petitioner contends that

Virginia Code Section 22.1-71, which gives school boards their power to contract as well as the power to sue and be sued, gives the School Board in this case the power to enter into the construction contract in question which contains an arbitration provision relating to the resolution of disputes for the particular construction work to be performed.

There are a couple of Supreme Court cases, *Dean Witter* and *Southland Corporation* which suggests that the purpose of the Federal Arbitration Act is to put agreements to arbitrate on the same footing as contract agreements, they are one in the same. And they want to give agreements to arbitrate the same force and effect as a contract agreement. There is also a D.C. Circuit case, I think it is called *Pierce*, cites the same proposition.

For that reason the petitioner believes the School Board had the power clearly to enter into this contract, and they had the power to enter into this contract which [6] contained an arbitration provision governing resolution of disputes relating solely to the contract itself.

Now, the School Board has raised several issues. The first issue goes to how the Virginia Code Section 22.1-71 is construed. The School Board would argue that under the Dillon Rule that statute has to be strictly construed. And because that statute doesn't say school boards have the power to arbitrate, rather it only says school boards have the power to contract, under Dillon Rule of construction, school boards don't have the power to enter into agreements to arbitrate.

Petitioner would contend in response to that issue that the statute does on its face say school boards have the power to contract. The Supreme Court has said that contracts are one in the same with agreements to arbitrate. And for that reason the statute gives the School Board the power to enter into contracts containing arbiration clauses.

There is a case that was issued by the Supreme Court of Virginia called *Arlington County* which interpreted

application of the Dillon Rule. And also looked at a rule called the reasonable selection of method rule. The Dillon Rule is whether the power exists. And the reasonable selection of method rule is whether the power has been properly executed.

The Dillon Rule is a rule of strict construction. [7] The reasonable selection of method rule is a rule that is liberally construed in favor of the method chosen.

The petitioner would submit that the statute gives the power to enter into the contract, and the agreement with the arbitration is a reasonable method to execute that power to contract. Arbitration provisions are fairly common in the construction industry. It is a way of having complex construction cases resolved by arbitrators who often are familiar with construction and technical aspects of construction. And for that reason, many of the standard contracts in the construction industry, including all of the AIA standard contracts, contain arbitration provisions and the parties agree to arbitrate their disputes relating to the construction work rather than litigate their disputes.

Finally, the School Board has cited a number of cases that deal with arbitration agreements entered into with the School Board, really the collective bargaining agreements containing arbitration agreements. And in those rare cases, those two or three of them, the Supreme Court of Virginia has said that Article 8, Section 7 of the Virginia Constitution empowers the school boards to supervise their teaching staff, so to speak, and it would be an unconstitutional divestiture of that power granted by the Virginia Constitution to allow an arbitrator to decide policy concerning the teaching staff.

[8] The cases all rationalize that where an agreement, in those cases it was a collective bargaining agreement, divest to an arbitrator to promulgate and establish policy, that is ununconstitutional act. In this case we are not talking about promulgation or application of policy. In this case we are dealing with one specific contract for

the renovation of certain work at a school. There is a claim that relates to the contract itself and nothing else. And the parties have agreed to arbitrate that claim under the mutual provision of the contract. The arbitrator's decision is not going to set policy for the School Board on any other construction contracts, it is just going to decide the issues of the claim in question.

For that reason the petitioner would ask the Court to sustain its appeal and enter an order compelling arbitration in this dispute.

Thank you.

MR. CAWLEY: Good morning, Judge Hilton. Tom Cawley for the Fairfax County School Board.

Your Honor, I think it is important to realize the context under which the deletion in question occurred here. Mr. Jones describes the deletion in 7.10 and then describes the fact that a couple of sections, 2.2.9, I think 2.2.10 were left in. He doesn't point out, however, that the section that was deleted by the School Board was entitled [9] Arbitration, and is the basic arbitration provision in an AIA general condition. It is entitled Arbitration and has and says, all claims, disputes and other matters arising out of, et cetera, shall be sent to arbitration. And then it gives the procedures for actually arbitrating or utilizing the arbitration process. It says that the American Arbitration Association processes will be used and the construction rules of the American Arbitration Association will be employed.

All of that is taken out. And what happened is that the sections that weren't deleted had to go, were buried really in the section on architects. And many sections into the section on architects there was this section that says appeals from architects' decisions could be arbitrated.

Moreover, when the original petition was filed we filed an affidavit from the Director of Design and Construction of the school system that pointed out that the school system has never arbitrated. That there is no language or no document that ever evidenced any intention to arbi-

rate. That the first word arbitration that ever occurred in the dealings between these two parties occurred when there was a demand for arbitration filed the next day by this petition. And that in fact this contractor has contracted with the School Board in the past and of course had no arbitration provision.

So, I think it is clear in the first instance that [10] there was no intention of the parties to have any sort of arbitration. And it would be absurd to think that the parties would delete the basic arbitration provision that explains how things would be arbitrated and how they would come about and the procedures for accomplishing that and then say that parenthetically some unstructured method of arbitration would be used to appeal architects' decisions.

Moreover, as Your Honor points out, it would be especially ironic if the very section that replaced the arbitration section, which was a no damage for delay clause, then became the very substance of the claim that is supposed to be sent to arbitration.

But going beyond that point, the fact of the matter is that in Virginia there simply is no power on the part of school boards to arbitrate. And Mr. Jones said that the Dillion Rule of construction is a rule of construction construing statutes. And while sometimes it is used to construe statutes, more fundamentally the Dillion Rule I think is a rule to construe powers, to construe whether or not local government has a particular power.

And obviously, and I know Your Honor is familiar with this, but the *Commonwealth versus Arlington County* case, which was a Commonwealth versus Arlington County and Arlington County School Board case, discussed at length the application of the Dillon Rule of the construction of powers [11] to try to determine what powers a local school division in a local county government would have. With respect to school boards, that case said school boards exercise limited powers and functions

of a public nature granted to them expressly or by necessary implication and none other.

And I think the thing that is so dispositive on this question of whether school boards have the power to arbitrate is the fact that in 1987 the General Assembly decided to give to county governments the right to arbitrate. And they did so by amending 15.1-508, which talks, which follows the basic section about how counties may sue and be sued, et cetera. And they added this language, the governing body of a county may enter into a written agreement to submit any existing controversy to arbitration and may execute a contract which contains a provision to submit to arbitration any controversy thereafter arising.

Now, whether you look at the Dillon Rule of construction or you even use just basic contract principles, inclusio unius est exclusio alterius I believe it is, it seems to me clear that if the counties are expressly given the power to arbitrate and school boards can point to no statute that gives them a similar power, it would be impossible to say under either contract construction principles or the Dillon Rule that school boards have the power to arbitrate.

[12] And that analysis in fact was utilized by the Supreme Court of Virginia in that case of *Arlington County versus Brown* where the County of Arlington argued that it had the power to enter into a lease. And it said, well, we have the power to transfer land, we have the power to sell. Therefore, we must have the power to lease. And the Supreme Court pointed out that cities expressly had the power to lease under Virginia law. And, therefore, if cities expressly had the powers to lease, and the county couldn't point to a similar power, then clearly the intention of the legisltaure was not to grant a similar power.

I think it is clear that the school boards in Virginia don't enjoy the power to arbitrate.

Finally, the Federal Arbitration Act doesn't change that result. Now, the Federal Arbitration Act would have

an impact on a specific statute in a state that singled out arbitration and was designed to prevent it. But it does not have an impact on general contractual provisions which might have the effect of not having an arbitration provision in a contract.

And those clearly enunciated principles are found in the *Supak* case by the Fourth Circuit. In that case there was a situation where a buyer in in South Carolina was buying materials from a New York supplier, and in the confirmation of sale the New York supplier when he would send the [13] confirmation of sale would put in that the parties agreed to arbitrate. And that case, when there was a dispute as to whether they had to go to arbitration, was determined under UCC 2-207 which says that in a confirmation of sale, if there is a material change in the terms, then those material changes don't give rise to a new contract. Or don't become a contractual provision. And there the other side said, well, the Federal Arbitration Act requires this arbitration to go forward.

And the Fourth Circuit said, no, it doesn't. This is not a situation where we have a singling out of a statute that is intended to do away with the right to arbitrate. It is a basic rule of construction of contracts which causes the situation where there is no arbitration provision, and it would apply to many things that might be material changes.

You compare that case to the *Saturn* case where a Virginia statute which did single out arbitration was struck down because of the fact that there was to that extent pre-emption by the Federal Arbitration Act. But the Federal Arbitration Act is not designed to, as one court said, to occupy the entire field of arbitration. And it does permit by its own terms an exception that permits arbitration except upon such grounds as exist at law or in equity for the revocation of any contract.

That's what we have here. We have a general [14] contractual provision, which is the Dillon Rule, which

prevents school boards from arbitrating. And, therefore, there is no federal pre-emption on that issue.

And we would ask that the decision of Magistrate Brinkema be upheld.

THE COURT: All right. Well, I find that it was the intent of the parties that the arbitration clause be removed from this contract. It was removed. The primary arbitration clause was taken out of the contract. It went even further when they took it out and said they couldn't even make a claim for these kinds of damages.

It is just clear the intent of the parties was to take out the arbitration provisions in the contract even though it may have been mentioned in passing in another area or two of the contract.

I also find the School Board doesn't have any authority to arbitrate in Virginia.

I do not find the decision of the magistrate to be clearly erroneous, and it will be affirmed.

MR. CAWLEY: Thank you, Your Honor.

HEARING CONCLUDED

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 91-4-M

W. M. SCHLOSSER COMPANY, INC.,
Plaintiff,

v.

THE COUNTY SCHOOL BOARD
OF FAIRFAX COUNTY, VIRGINIA,
Defendant.

[Filed April 5, 1991]

ORDER

For the reasons stated in open court, petitioner's Motions to Designate an Arbitrator and for an Order to Compel Arbitration are DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 5th day of April, 1991.

/s/ Leonie M. Brinkema
LEONIE M. BRINKEMA
United States Magistrate Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action Number 91-4-M

W. M. SCHLOSSER COMPANY, INC.,
Petitioner,

vs.

THE COUNTY SCHOOL BOARD
OF FAIRFAX COUNTY, VIRGINIA,
Respondent.

Friday, April 5, 1991

Courtroom IV
United States District Courthouse
Alexandria, Virginia

The above-entitled matter came on to be heard before THE HONORABLE LEONIE M. BRINKEMA, United States Magistrate, in and for the United States District Court for the Eastern District of Virginia, beginning at 10:59 o'clock a.m.

APPEARANCES:

On Behalf of the Petitioner:

ROGER C. JONES, ESQUIRE
BRAUDE & MARGULIES, P.C.

[2]

On Behalf of the Respondent:

THOMAS J. CAWLEY, ESQUIRE
HUNTON & WILLIAMS

---

[3] PROCEEDINGS

THE CLERK: Civil action 91 dash 4 M, W.M. Schlosser Company versus The County Board of Fairfax County.

MR. JONES: Good morning, Your Honor.

THE COURT: Good morning.

MR. JONES: Roger Jones on behalf of the Petitioner.

THE COURT: I'm sorry; the door was slamming.

MR. JONES: I'm sorry; Roger Jones on behalf of the Petitioner, W.M. Schlosser.

THE COURT: And for the County?

MR. CAWLEY: Excuse me; Thomas Cawley for the School Board, Your Honor.

THE COURT: All right; now, this comes before me on two motions of the Petitioner, one to designate an arbitrator and one for an order to compel arbitration.

MR. JONES: That's correct, Your Honor.

THE COURT: I've looked at both your pleadings. I understand that the School Board's position is, number one, that it was certainly their intent when they entered this contract that arbitration not be a part of the contract.

[4] And they've cited to a miscellaneous provision within the contract which negates, in their opinion, arbitration.

I understand you're saying that they only negated a particular portion of the A.I.A. contract.

MR. JONES: Negated not really a portion; the procedure by which arbitration is pursued under the A.I.A. contract, that procedure is that the American Arbitration Association—

Article seven point ten that was deleted simply deleted that procedure. The supplementary condition did not say arbitration is deleted from this contract.

It just said delete article seven point ten. The underlying arbitration agreement in article two, two point two point ten, is still intact.

That wasn't deleted by any supplementary condition.

THE COURT: But of course what I have here is a —this is sort of a classic contract problem. I have two parties to a contract. There is language in dispute.

One side says, 'We didn't intend for that.' And they're also saying further, 'We're not legally able—[5]we couldn't contract that, even if we wanted to.'

You're saying, 'This is what the parties agreed to.' And furthermore, 'You can do it under the law.'

MR. JONES: Well, I think if you read the provisions consistent with each other and compatible with each other, which is black letter contract law, if you read article two point two point ten, that claims relating to execution and the progress of the work which had been referred to the architect are subject to arbitration.

You read the supplementary condition deleting article seven point ten as deleting the procedure to proceed with that arbitration at the American Arbitration Association.

And it just leaves—it doesn't—there's no method prescribed in that contract for arbitration, which is okay.

The Federal Arbitration Act then sets up a procedure where they can go to court and have designated arbitrators.

There's a lot of reasons why parties might want to delete the procedure of arbitration under triple A. It's expensive.

[6] Over the years, it's—it's taking more time now.

THE COURT: I'm curious; were you the attorneys involved in negotiating the contract?

MR. CAWLEY: No, Your Honor.

THE COURT: No; so, neither of you knows what the—have you talked with the various negotiators as to what their understanding was at the operation of that provision?

MR. CAWLEY: Your Honor, I am counsel for The School Board. And in general—I've been counsel for The School Board for 15 years—and we've always advised them that they don't have the right to arbitrate.

The particular formation of this contract was done—I believe the architect had something to do with it and the staff was involved.

But I don't believe there were attorneys on either side, to my knowledge.

MR. JONES: No; the Petitioner in this case is a Maryland company. He's coming here to Virginia to do some renovation work on a high school.

If there was a dispute about execution or the progress of the work, I'm sure that they intended to have [7] it submitted to arbitration versus going to trial with a Jury in Fairfax County.

Arbitration may be a more impartial way of resolving any sort of dispute between the parties.

THE COURT: All right; well, I've read the contract that you all attached to the pleadings. And I've looked at your briefs real carefully.

I can't grant the motion. I am convinced, as I read the law, that Mr. Cawley's argument is the better of the two.

I don't think—there certainly is unclarity as to what the parties intended with the language of the contract.

But I think that the case law and the argument made as to the legal ability of The School Board to contract for arbitration is the sounder of the two arguments.

So, I'm going to deny your motion to designate an arbitrator and the motion to compel arbitration.

MR. JONES: And just so I understand, it's based on the fact that—

THE COURT: I'm not at all clear that the parties intended—

[8] MR. JONES: Okay.

THE COURT: From my reading of the contract, I don't think it was the intent of at least one party to the contract to allow for arbitration.

I think they attempted to do that with the language that may not have been as artfully drafted as it should have been to make it crystal clear that there is no arbitration available in this contract.

And secondly, I don't think that Virginia law empowers school boards to enter into that kind of an arbitration agreement.

MR. JONES: Notwithstanding the provisions of the Virginia Code 22—

THE COURT: That's correct.

MR. JONES: —point 1 dash 71?

THE COURT: That's correct; I don't think it applies to the school boards.

All right, sir?

MR. JONES: Thank you.

MR. CAWLEY: Thank you, Judge Brinkema.

---

[9] (Whereupon, at approximately 11:06 o'clock a.m., the hearing in the above-entitled matter was concluded.)

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Miscellaneous No. 91-0004-M

W.M. SCHLOSSER COMPANY, INC.
2400 51st Place
Hyattsville, Maryland 20781,
Petitioner,

v.

THE COUNTY SCHOOL BOARD OF
FAIRFAX COUNTY, VIRGINIA
10700 Page Avenue
Fairfax, Virginia 22030
Respondent.

Serve:

JANE TIMIAN
Clerk, Fairfax County School Board
10700 Page Avenue
Fairfax, Virginia 22030

PETITION FOR ORDER TO COMPEL ARBITRATION

1. Petitioner, W.M. Schlosser Company ("Schlosser"), is a Maryland corporation with its principal place of business in Hyattsville, Maryland. Petitioner is engaged in the business of construction contracting as a general contractor.

2. Respondent is the School Board of Fairfax County, Virginia (hereinafter sometime referred to as the "Owner").

3. This Petition is filed pursuant to the provisions of 9 U.S.C. § 4 for an Order to Compel Arbitration of a claim, which is the subject of a written arbitration agreement that is governed by the Federal Arbitration Act, 9. U.S.C. § 1, *et seq.* since the underlying transaction involves interstate commerce and is between parties of different states. Respondent has failed and refused to arbitrate said claim.

4. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1332, based upon diversity of citizenship and since the amount in controversy exceeds $50,000, exclusive of interest and costs.

5. All conditions precedent for the filing of this Petition have been satisfied.

6. On or about June 10, 1988, Respondent entered into a Contract with Petitioner (hereinafter the "Contract"), for the performance of certain construction renovation work relating to Falls Church High School (hereinafter the "Project"). The Project is located in Fairfax County, Virginia. A copy of said Contract, with its General and Supplementary Conditions, is attached hereto as Exhibit A.

7. The Contract provides in pertinent part:

> 2.2.7 Claims, disputes and other matters in question between the Contractor and the Owner relating to the execution or progress of the work or the interpretation of the Contract documents shall be referred initially to the architect for decision which he will render in writing within a reasonable time.
>
> * * * *
>
> 2.2.10 Any claim, dispute or other matter that has been referred to the architect . . . *shall be subject to arbitration* upon the written demand of either party. However, no demand for arbitration of any such claim, dispute or other matter may be made until the earlier of:

2.2.10.1 The date on which the architect has rendered his written decision, or

.2 The 10th day after the parties have presented their evidence to the architect or have been given a reasonable opportunity to do so, if the architect has not rendered his decision by that date. [Emphasis added].

8. During the course of the Contract, Schlosser's performance was hindered, disrupted, impacted and delayed due to the actions, inactions and active interference of the Owner. The Owner's conduct in this regard constituted a breach of the Owner's Contract obligations. As a result of the Owner's breaches of Contract, Schlosser's Contract performance was extended 209 calendar days and Schlosser suffered significant additional costs and damages.

9. On or about August 3, 1990, Schlosser submitted to the Owner a claim for its additional costs and damages stemming from the extended Contract performance, in the total amount of $1,152,941. In accordance with Article 2.2.7 of the Contract, Schlosser also submitted a copy of this claim to the architect for his decision.

10. On or about October 9, 1990, the Owner advised Schlosser that Schlosser's claim was being reviewed by the architect. By letter dated January 10, 1991, Schlosser noted to the Owner that its claim, "was initially copied to the architect and we expect his decision on our entire claim, in accordance with the Contract requirements." A copy of this letter is attached hereto as Exhibit B. Despite the fact that a reasonable time has elapsed, the architect has failed to render in writing a decision on Schlosser's claim.

9. In accordance with Article 2.2.10 of the Contract, on March 27, 1991, Schlosser submitted to the Owner a written Demand for Arbitration with respect to their

claim for extended Contract performance. A copy of this Demand for Arbitration is attached hereto as Exhibit C. To date, the Owner has failed to respond to this Demand for Arbitration.

10. By separate motion, filed contemporaneously herewith, Petitioner also seeks this Court to designate and appoint an impartial arbitrator(s) pursuant to 9 U.S.C. § 5.

WHEREFORE, Petitioner, W.M. Schlosser Company, Inc. respectfully requests this Court to enter an Order directing that arbitration of Petitioner's claim proceed in the manner provided for in the parties' Arbitration Agreement and as required by the Federal Arbitration Act, and for such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

By: /s/ Roger C. Jones
ROGER C. JONES
Va. Bar No. 25256
BRAUDE & MARGULIES, P.C.
1828 L Street, N.W.
Suite 900
Washington, D.C. 20036

Counsel for Plaintiff
W.M. Schlosser Company, Inc.

Dated: 3.28.91

EXHIBIT A

THE AMERICAN INSTITUTE OF ARCHITECTS

[LOGO]

AIA Document A101

STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR

where the basis of payment is a

STIPULATED SUM

This Document Has Important Legal Consequences: Consultation With An Attorney Is Incouraged With Respect To Its Completion Or Modification

Use only with the latest Edison of AIA Document A201, General Conditions of the Contract for Construction.

This document has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT Contract #090-88-RE-599

made this 9th day of June in the year of Ninteen Hundred and Eighty-Eight

BETWEEN the Owner:

The County School Board of Fairfax County, Virginia
10700 Page Avenue
Fairfax, Virginia 22030

and the Contractor:

W. M. Schlosser Company, Inc.
2400 51st Place
Hyattsville, Maryland 20781

the Project:

Renewal of
Falls Church High School

the Architect:

The Fairfax Architects, P.C.
246A West Broad Street
Falls Church, Virginia 22046

The Owner and the Contractor agree as set forth below.

ARTICLE 1

THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, all Addenda issued prior to execution of this Agreement and all Modifications issued subsequent thereto. These form the Contract, and all are as fully a part of the Contract as if attached to this Agreement or repeated herein. An enumeration of the Contract Documents appears in Article 7.

ARTICLE 2

THE WORK

The Contractor shall perform all the Work required by the Contract Documents for the provision of all labor, materials, equipment and services necessary for the renewal of the existing building at Falls Church High School, 7521 Jaguar Trail, Falls Church, Virginia 22042.

ARTICLE 3

TIME OF COMMENCEMENT AND COMPLETION

The Work to be performed under this Contract shall be commenced on or about June 10, 1988 and shall be substantially completed on or before August 31, 1989.

The project shall be constructed in phases. The Architect shall determine and certify when the work is substantially completed for each phase. Work shall commence and be substantially completed on or before the dates shown in section 01010 entitled summary of the work, Paragraph 3.1.B, "Schedule for Delivery of the Work". Should the work not be substantially completed by the dates specified for each phase, it is understood and agreed that there will be deducted the sum of $200.00 for each phase, per consecutive calendar day, as liquidated damages, but not as a penalty, for each day's delay thereof until substantial completion of each phase is certified by the Architect.

Should the total project not be substantially completed by August 31, 1989, it is understood and agreed that there will be deducted the *further sum* of $600.00 per consecutive calendar day, *in addition to any other sum due hereunder* for the total project, as liquidated damages, but not as a penalty, for each day's thereof until substantial completion is certified by the Architect and accepted by the Owner.

ARTICLE 4

CONTRACT SUM

The Owner shall pay the Contractor for the performance of the Work, subject to additions and deductions by Change Order as provided in the Conditions of the Contract, in current funds, the Contract Sum of nine million three hundred seventy six thousand dollars ($9,376,000) consisting of:

$8,777,000	Base Bid
599,000	Alternate No. 1
$9,376,000	

ARTICLE 5

PROGRESS PAYMENTS

Based upon Applications for Payment submitted to the Architect by the Contractor, the Owner shall make prog-

ress payments on account of the Contract Sum to the Contractor as provided in the General and Supplementary and Special Conditions.

"The form for each progress payment shall be the Fairfax County School Board's 'Requisition for Partial Payment' and will be obtained from the School Board's Design and Construction Department. The form shall be completed in detail and submitted in six (6) copies. The Owner shall make a Progress Payment to the Contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under this contract, but to insure proper performance of this contract, the Owner shall retain five (5) percent of the amount of each estimate properly allocable to labor, materials and equipment incorporated in the work and ten (10) percent of the amount of each estimate properly allocable to materials and equipment suitably stored at the site until final completion and acceptance of all work covered by this contract. The Contractor shall include a similar provision limiting retainage on progress payments in all subcontracts it enters into pursuant to the Contractor's performance of this Contract."

ARTICLE 6

FINAL PAYMENT

Final payment, constituting the entire unpaid balance of the Contract Sum, shall be paid by the Owner to the Contractor Thirty (30) days after Substantial Completion of the Work unless otherwise stipulated in the General and Supplementary Conditions, provided the Work has been satisfactorily completed, the Contract totally completed, and a final certificate for Payment has been issued by the Architect.

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 Terms used in this Agreement which are defined in the Conditions of the Contract shall have the meanings designated in those Conditions.

7.2 The Contract Documents, which constitute the entire agreement between the Owner and the Contractor, are listed in Article 1 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

(List below the Agreement, Conditions of the Contract (General, Supplementary, and other Conditions), Drawings, Specifications, Addenda and accepted Alternates, showing page or sheet numbers in all cases and dates where applicable.

Standard Form of Agreement Between Owner & Contractor, AIA Document A101 January 1974.

General Conditions of the Contract for Construction, AIA Document A201 April 1970.

Specifications: See attached pages 1 through 3, pages i, ii.

Drawings:	Civil	C-1 through C-4
	Architectural	A-0 through A-60
	Structural	S-1 and S-2
	Mechanical	M-1 through M-38
	Plumbing	P-1 through P-34
	Electrical	E-1 through E-51

Addenda: Addendum No. 1 dated May 13, 1988.
Addendum No. 2 dated May 18, 1988
Addendum No. 3 dated May 20, 1988
Addendum No. 4 dated May 23, 1988
Addendum No. 5 dated May 24, 1988

Accepted: Base Bid and Alternate No. 1

This Agreement executed the day and year first written above. This Agreement, under seal, is executed in 4 counterparts each deemed as original.

OWNER

The County School
Board of Fairfax
County, Virginia

/s/ [Illegible]
Chairman

/s/ Jane Timion
Clerk of the School
Board SEAL

CONTRACTOR

W.M. Schlosser Company,
Inc.

/s/ [Illegible]
President

/s/ [Illegible]
Corporate Secretary [SEAL]

Section 00700
General Conditions

THE AMERICAN INSTITUTE OF ARCHITECTS

[LOGO]

AIA Document A201

GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

This Document Has Important Legal Consequences: Consultation With An Attorney Is Encouraged With Respect To Its Modification

---

TABLE OF ARTICLES

1. CONTRACT DOCUMENTS
2. ARCHITECT
3. OWNER
4. CONTRACTOR
5. SUBCONTRACTORS
6. SEPARATE CONTRACTS
7. MISCELLANEOUS PROVISIONS
8. TIME
9. PAYMENTS AND COMPLETION
10. PROTECTION OF PERSONS AND PROPERTY
11. INSURANCE
12. CHANGES IN THE WORK
13. UNCOVERING AND CORRECTION OF WORK
14. TERMINATION OF THE CONTRACT

This document has been approved and endorsed by The Associated General Contractors of America.

INDEX

Acceptance of Defective or Non-Conforming Work 13.3
Access to Work 2.2.3
Accident Prevention 2.2.4, 18
Addendum, Definition of 1.1.1
Additional Costs, Claims for 12.2.1
Additional Work 12
Administration of the Contract 2.2
Agreement, Extent of 1.1, 1.2
Allowances, Cash 4.8.7
Applications for Payment 2.2.5, 9.2.1, 9.3.1, 9.3.3, 9.4.1, 9.4.2, 9.5.1, 9.6.7, 9.7.2
Arbitration, Owner-Contractor Claims and Disputes 2.2.6 through 2.2.12, 7.10
ARCHITECT 2
Architect, Definition of 2.1
Architect's Access to the Work 2.2.3
Architect's Authority 2.2.2, 2.2.12, 2.2.14, 2.2.17, 4.17, 12.1.2
Architect's Authority to Reject Work 2.2.12
Architect's Decisions 2.2.6 through 2.2.12
Architect's interpretations 1.2.5, 2.2.6 through 2.2.11, 12.1.6
Architect's Full-Time Project Representative 2.2.16
Architect's States 2.2
Architect's Visits to Site 2.2.3, 2.2.4, 2.2.15, 7.8, 9.7

Bonds, Contract (Performance, Labor and Material Payment) 7.5
Builder's Risk Insurance (See Property Insurance) 11.3
Cash Allowances 4.8.1
Certification for Payment 2.2.5, 2.2.15, 5.4.2, 9.4, 9.3.1, 9.6.1, 9.7. 2
CHANGES IN THE WORK 12
Changes, Minor 2.2.14, 12.3
Change Orders 2.2.14, 4.8.1, 12.1
Change Orders, Definition of 12.1.2
Claims and Disputes Between the Contractor and the Owner 2.2.6 through 2.2.12, 7.10
Claims for Additional Cost or Time 8.3.2, 8.3.3, 12.1.6, 12.1.7, 12.2
Claims for Damages 7.4, 8.3
Claims of the Subcontractor 5.3. 1.4

Cleaning up	4.16, 6.4
Codes	4.7.2, 18.2.3
Commencement of the Work	7.5.1, 8.1.2
Communications	2.2.2, 3.2.4, 4.9.1, 4.17
COMPLETION, PAYMENTS AND	9
Completion Substantial	2.2.15, 8.1.3, 8.2.3, 9.7
Contract, Definition of	1.1.2
Contract Bonds	7.5
CONTRACT DOCUMENTS	1
Contract Documents, Copies Furnished and Ownership of	1.3
Contract Documents, Definition of	1.1.1
Contract Documents, Execution, Correlation, intent and interpretation	1.2
Contract Modifications	1.1.1, 1.2.5, 12
Contract Sum, Changes of	12.1, 12.2
Contract Sum, Definition of	9.1.1
Contract Termination by Contractor	14.1
Contract Termination by Owner	14.2
Contract Time	8.1.1
Contracts, Separate	6.1
CONTRACTOR	4
Contractor, Definition of	4.1
Contractor, Stopping the Work by the	2.6.1
Contractor, Termination of the Contract by the	14.1
Contractor's Liability Insurance	11.1
Contractor's Relations with Subcontractors	1.2.4, 5.3
Contractor's Responsibility for Protection and Safety	10.1, 10.2
Contractor's Responsibility for Those Performing the Work	4.10
Contractor's Review of Contract Documents	1.2.2, 4.2
Contractor's Superintendent	4.9.1, 10.2.5
Contractor's Supervision and Construction Procedures	4.3
Contractors, Mutual Responsibility of	6.2
Copies Furnished of Drawings and Specifications	1.3.1
Correction of Work	13.2
Cutting and Patching of Work	4.15
Cutting and Patching Under Separate Contracts	6.3

Damages, Claims for 7.4, 8.3
Damages for Delay 8.3.4
Day, Definition of 8.1.4
Debris Removal 4.16, 6.4
Deductions for Uncorrected Work 13.3.1
Defective or Non-Conforming Work,
Acceptance of 13.3
Delays and Extension of Time 8.3
Documents, Execution of the Contract 1.2.1
Drawings and Specifications at the Site 4.12
Drawings and Specifications, Ownership of 1.3.2
Drawings, Arrangement of 1.2.4
Drawings as Written Interpretations 1.2.5

Easements 3.2.2
Emergencies 10.3
Execution, Correlation, Intent and Interpretations of
the Contract Documents 1.2
Extension of Time 8.3, 12.1
Extras 12

Failure of Payment 9.6
Field Orders 1.2.5, 12.3, 12.4
Final Payment 9.7
Fire, Extended Coverage, Vandalism and Malicious
Mischief Insurance 11.3.1

Governing Law 7.1
Guarantee Bonds 7.5
Guarantee 9.3.3, 13.2.2

Indemnification 4.18
Information and Services Required of the Owner 3.2
Inspection 2.2.15, 7.8, 9.7
Instructions to the Contractor 2.2.2, 3.2.4
INSURANCE 11
Insurance, Builders Risk (See Property
Insurance 11.3.1
Insurance, Contractor's Liability 11.1
Insurance, Fire, Extended Coverage, Vandalism, and
Malicious Mischief 11.3.1
Insurance, Loss of Uose 11.4
Insurance, Owner's Liability 11.2

Insurance, Property 11.3
Insurance, Special Hazards 11.3.5
Insurance, Steam Boiler and Machinery 11.3.2
Interest 7.9.1
Interpretaitons and Decisions
of the Architect ..... 2.2.6 through 2.2.12
Interpretations, Written 1.1.1, 1.2.5, 12.3, 12.4

Labor and Materials 4.4, 4.5
Labor and Material Payment Bond 7.5
Laws 4.6, 4.7, 7.1, 10.2
Liens 9.7.3, 9.7.5
Loss of Use Insurance 11.4.1

Materials, Labor and 4.4, 4.5
Minor Changes in the Work 1.1.1, 12.3, 12.4
MISCELLANEOUS PROVISIONS 7
Modifications to the Contract 1.1.1, 12
Mutual Responsibility of Contractors 6.2

Non-Conforming Work, Accepance of
Defective or 13.3.1
Notice of Testing and Inspections 7.8
Notice to Proceed 8.1.2
Notice, Written 7.3
Notices, Permits, Fees and 4.7

OWNER 3
Owner, Definition of 3.1
Owner, Termination of the Contract by the 14.2
Owner's Information and Service 3.2
Owner's Liability Insurance 11.2
Owner's Right to Carry Out the Work 3.4
Owner's Right to Clean Up 4.16.2, 6.4
Owner's Right to Award Separate Contracts 6.1
Owner's Right to Stop the Work 3.3
Ownership of Drawings and Spectifications 1.3.2

Patching of Work 4.15
Patching of Work Under Separate Contracts 6.3
Payments, Royalties and 7.7.1
PAYMENTS AND COMPLETION 9
Payment, Applications for 2.2.5, 9.2.1, 9.3.1, 9.3.3, 9.4.1,
9.4.2, 9.5.1, 9.6.1, 9.7.2

Payment,
Certificates for 2.2.5, 2.2.15, 5.4.2, 9.4, 9.5.1, 9.6.1, 9.7.2
Payment, Failure of 9.6
Payment, Final 2.2.18, 9.7
Payments, Program 9.3, 9.4
Payments to Subcontractors 5.4
Payments Withheld 9.5
Performance Bond 7.5
Payments, Fees and Notices 4.7
PERSONS AND PROPERTY, PROTECTION OF 10
Program and Completion 8.2
Program Payments 9.3, 9.4
Program Schedule 4.11
Project, Definitions of 1.1.4
Project Loss or Damage Insurance 11.3
Project Representatives, Full-Time 2.2.16
Property Insurance 11.3
PROTECTION OF PERSONS AND PROPERTY 10

Regulations 4.7.2, 10.2.2
Rejection of Work 2.2.12, 13.2
Releases of Waivers and Liens 9.7.3, 9.7.5
Responsibility for Those Performing the Work 4.10, 9.7.1
Retainage 5.4.2, 9.7.3, 9.7.4
Review of Contract Documents by the Contractor 1.2.2, 4.2
Royalties and Patents 7.7
Rights and Remedies 7.6

Safety of Persons and Property 10.2
Safety Precautions and Programs 2.3.4, 10.1
Samples, Shop Drawings and 2.2.13, 4.13
Schedule of Values 9.2
Schedules, Progress 4.71
SEPARATE CONTRACTS 6
Separate Contracts, Owner's Right to Award 6.1
Shop Drawings and Samples 2.2.13, 4.13
Site, Use of 4.14.1
Special Hazards Insurance 11.3.5
Specifications, Organization of 1.3.4
Steam Boiler and Machinery Insurance 11.3.2
Stopping the Work 3.3
SUBCONTRACTORS 5

Subcontractor, Claims of 5.3.1.4
Subcontractor, Definition of 5.1.1
Subcontracts, Award of 1.2.4, 5.2
Subcontractual Relations 5.3
Substantial Completion and Final Payment 2.2.15, 9.7
Substantial Completion, Date of 2.2.15, 8.1.3, 8.2.3
Sub-subcontractor, Definition of 5.1.2
Subsurface Conditions 12.1.6
Successors and Assigns 7.2
Supervision and Construction Procedures 4.3.1
Superintendent, Contractor's 4.9.1, 10.2.5
Surveys 3.2.1

Taxes 4.6
Termination by the Contractor 14.1
Termination by the Owner 14.2
TERMINATION OF THE CONTRACT 14
Tests 2.2.12, 7.8
TIME 8
Time, Definition of 8.1
Time, Delays and Extensions of 8.3, 12.1, 12.2
Title of Work 9.1.3

UNCOVERING AND CORRECTION OF WOFK 13
Uncovering of Work 13.1
Unit Prices 12.1.3, 12.1.5
Use of Site 4.14

Values, Schedule of 9.2

Waiver of Claims by the Contractor 9.7.6
Waiver of Claims by the Owner 9.7.5
Warranty 4,5, 9.3.3
Words, Recognized Meanings of 1.2.3
Work, Definition of 1.1.3
Written Notice 7.3

GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

ARTICLE 1

CONTRACT DOCUMENTS

1.1 DEFINITIONS

1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement, the Conditions of the Contract (General, Supplementary and other Conditions), the Drawings, the Specifications, all Addenda issued prior to execution of the Contract, and all Modifications thereto. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a written interpretation issued by the Architect pursuant to Subparagraph 1.2.5, or (4) a written order for a minor change in the Work issued by the Architect pursuant to Paragraph 12.3. A Modification may be made only after execution of the Contract.

1.1.2 THE CONTRACT

The Contract Documents form the Contract. The Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negatiations, representations, or agreements, either written or oral, including the bidding documents. The Contract may be amended or modified only by a Modification as defined in Subparagraph 1.1.1.

1.1.3 THE WORK

The term Work includes all labor necessary to produce the construction required by the Contract Documents, and all materials and equipment incorporated or to be incorporated in such construction.

1.1.4 THE PROJECT

The Project is the total construction designed by the Architect of which the Work performed under the Contract Documents may be the whole or a part.

1.2 EXECUTION, CORRELATION, INTENT AND INTERPRETATIONS

1.2.1 The Contract Documents shall be signed in not less than triplicate by the Owner and Contractor. If either the Owner or the Contractor or both do not sign the Conditions of the Contract. Drawings, Specifications, or any of the other Contract Documents, the Architect shall identify them.

1.2.2 By executing the Contract, the Contractor represents that he has visited the site, familiarized himself with the local conditions under which the Work is to be performed, and correlated his observations with the requirements of the Contract Documents.

1.2.3 The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. The intention of the Documents is to include all labor, materials, equipment and other items as provided in Subparagraph 4.41 necessary for the proper execution and completion of the Work, it is not intended that Work not covered under any heading, section, branch, class or trade of the Specifications shall be supplied unless it is required elsewhere in the Contract Documents or is reasonably inferable therefrom as being necessary to produce the intended results. Words which have well-known technical or trade meanings are used herein in accordance with such recognized meanings.

1.2.4 The organization of the Specifications into divisions, sections and articles, and the arrangement of Drawings, shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.5 Written interpretations necessary for the proper execution or progress of the Work, in the form of drawings or otherwise, will be issued with reasonable promptness by the Architect and in accordance with any schedule agreed upon. Either party to the Contract may make written request to the Architect for such interpretations. Such interpretations shall be consistent with and reasonably inferable from the Contract Documents, and may be effected by Field Order.

1.3 COPIES FURNISHED AND OWNERSHIP

1.3.1 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, all copies of Drawings and Specifications reasonably necessary for the execution of the Work.

1.3.2 All Drawings, Specifications and copies thereof furnished by the Architect are and shall remain his property. They are not to be used on any other project, and, with the exception of one contract set for each party to the Contract are to be returned to the Architect on request at the completion of the Work.

ARTICLE 2

ARCHITECT

2.1 DEFINITION

2.1.1 The Architect is the person or organization licensed to practice architecture and identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term Architect means the Architect or his authorized representative.

2.1.2 Nothing contained in the Contract Documents shall create any contractual relationship between the Architect and the Contractor.

2.2 ADMINISTRATION OF THE CONTRACT

2.2.1 The Architect will provide general Administration of the Construction Contract, including performance of the functions hereinafter described.

2.2.2 The Architect will be the Owner's representative during construction and until final payment. The Architect will have authority to act on behalf of the Owner to the extent provided in the Contract Documents, unless otherwise modified by written instrument which will be shown to the Contractor. The Architect will advise and consult with the Owner, and all of the Owner's instructions to the Contractor shall be issued through the Architect.

2.2.3 The Architect shall at all times have access to the Work wherever it is in preparation and progress. The Contractor shall provide facilities for such access so the Architect may perform his functions under the Contract Documents.

2.2.4 The Architect will make periodic visits to the site to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. The Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

2.2.5 Based on such observations and the Contractor's Applications for Payment, the Architect will determine

the amounts owing to the Contractor and will issue Certificates for Payment in such amounts, as provided in Paragraph 9.4.

2.2.6 The Architect will be, in the first instance, the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both the Owner and Contractor. The Architect will, within a reasonable time, render such interpretations as he may deem necessary for the proper execution or progress of the Work.

2.2.7 Claims, disputes and other matters in question between the Contractor and the Owner relating to the execution or progress of the Work or the interpretation of the Contract Documents shall be referred initially to the Architect for decision which he will render in writing within a reasonable time.

2.2.8 All interpretations and decisions of the Architect shall be consistent with the intent of the Contract Documents. In his capacity as interpreter and judge, he will exercise his best efforts to insure faithful performance by both the Owner and the Contractor and will not show partiality to either.

2.2.9 The Architect's decisions in matters relating to artistic effect will be final if consistent with the intent of the Contract Documents.

2.2.10 Any claim, dispute or other matter that has been referred to the Architect, except those relating to artistic effect as provided in Subparagraph 2.2.9 and except any which have been waived by the making or acceptance of final payment as provided in Subparagraphs 9.7.5 and 9.7.6, shall be subject to arbitration upon the written demand of either party. However, no demand for arbitration of any such claim, dispute or other matter may be made until the earlier of:

2.2.10.1 The date on which the Architect has rendered his written decision, or

.2 the tenth day after the parties have presented their evidence to the Architect or have been given a reasonable opportunity to do so, if the Architect has not rendered his written decision by that date.

2.2.11 If a decision of the Architect is made in writing and states that it is final but subject to appeal, no demand for arbitration of a claim, dispute or other matter covered by such decision may be made later than thirty days after the date on which the party making the demand received the decision. The failure to demand arbitration within said thirty days' period will result in the Architect's decision becoming final and binding upon the Owner and the Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence but will not supersede any arbitration proceedings unless the decision is acceptable to the parties concerned.

2.2.12 The Architect will have authority to reject Work which does not conform to the Contract Documents. Whenever, in his reasonable opinion, he considers it necessary or advisable to insure the proper implementation of the intent of the Contract Documents he will have authority to require special inspection or testing of the Work in accordance with Subparagraph 7.8.2 whether or not such Work be then fabricated, installed or completed. However, neither the Architect's authority to act under this Subparagraph 2.2.12, nor any decision made by him in good faith either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the Architect to the Contractor, any Subcontractor, any of their agents or employees, or any other person performing any of the Work.

2.2.13 The Architect will review Shop Drawings and Samples as provided in Subparagraphs 4.13.1 through 4.13.8 inclusive.

2.2.14 The Architect will prepare Change Orders in accordance with Article 12, and will have authority to order minor changes in the Work as provided in Subparagraph 12.3.1.

2.2.15 The Architect will conduct inspections to determine the dates of Substantial Completion and final completion, will receive and review written guarantees and related documents required by the Contract and assembled by the Contractor and will issue a final Certificate for Payment.

2.2.16 If the Owner and Architect agree, the Architect will provide one or more Full-Time Project Representatives to assist the Architect in carrying out his responsibilities at the site. The duties, responsibilities and limitations of authority of any such Project Representative shall be as set forth in an exhibit to be incorporated in the Contract Documents.

2.2.17 The duties, responsibilities and limitations of authority of theArchitect as the Owner's representative during construction as set forth in Articles 1 through 14 inclusive of these General Conditions will not be modified or extended without written consent of the Owner, the Contractor and the Architect.

2.2.18 The Architect will not be responsible for the acts or omissions of the Contractor, any Subcontractors, or any of their agents or employees, or any other persons performing any of the Work.

2.2.19 In case of the termination of the employment of the Architect, the Owner shall appoint an architect against whom the Contractor makes no reasonable objection whose status under the Contract Documents shall be that of the former architect. Any dispute in connection with such appointment shall be subject to arbitration.

ARTICLE 3

OWNER

3.1 DEFINITION

3.1.1 The Owner is the person or organization identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term Owner means the Owner or his authorized representative.

3.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

3.2.1 The Owner shall furnish all surveys describing the physical characteristics, legal limits and utility locations for the site of the Project.

3.2.2 The Owner shall secure and pay for easements for permanent structures or permanent changes in existing facilities.

3.2.3. Information or services under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in the orderly progress of the Work.

3.2.4 The Owner shall issue all instructions to the Contractor through the Architect.

3.2.5 The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein and especially those in respect to Payment and Insurance in Articles 9 and 11 respectively.

3.3 OWNER'S RIGHT TO STOP THE WORK

3.3.1 If the Contractor fails to correct defective Work or persistently fails to supply materials or equipment in accordance with the Contract Documents, the Owner may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

3.4 OWNER'S RIGHT TO CARRY OUT THE WORK

3.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision of the Contract, the Owner may, after seven days' written notice to the Contractor and without prejudice to any other remedy he may have, make good such deficiencies. In such case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including the cost of the Architect's additional services made necessary by such default, neglect or failure. The Architect must approve both such action and the amount charged to the Contractor. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

ARTICLE 4

CONTRACTOR

4.1 DEFINITION

4.1.1 The Contractor is the person or organization identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term Contractor means the Contractor or his authorized representative.

4.2 REVIEW OF CONTRACT DOCUMENTS

4.2.1 The Contractor shall carefully study and compare the Contract Documents and shall at once report to the Architect any error, inconsistency or omission he may discover. The Contractor shall not be liable to the Owner or the Architect for any damage resulting from any such errors, inconsistencies or omissions in the Contract Documents. The Contractor shall do no Work without Drawings, Specifications or Modifications.

4.3 SUPERVISION AND CONSTRUCTION PROCEDURES

4.3.1 The Contractor shall supervise and direct the Work, using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

4.4 LABOR AND MATERIALS

4.4.1 Unless otherwise specifically noted, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work.

4.4.2 The Contractor shall at all times enforce strict discipline and good order among his employees and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him.

4.5 WARRANTY

4.5.1 The Contractor warrants to the Owner and the under this Contract will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not so conforming to these standards may be considered defective. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

4.6 TAXES

4.6.1 The Contractor shall pay all sales, consumer, use and other similar taxes required by law.

4.7 PERMITS, FEES AND NOTICES

4.7.1 The Contractor shall secure and pay for all permits, governmental fees and licenses necessary for the proper execution and completion of the Work, which are applicable at the time the bids are received. It is not the responsibility of the Contractor to make certain that the Drawings and Specifications are in accordance with applicable laws, statutes, building codes and regulations.

4.7.2 The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the Work. If the Contractor observes that any of the Contract Documents are at variance therewith in any respect, he shall promptly notify the Architect in writing, and any necessary changes shall be adjusted by appropriate Modification. If the Contractor performs any Work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the Architect, he shall assume full responsibility therefor and shall bear all costs attributable thereto.

4.8 CASH ALLOWANCES

4.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. These allowances shall cover the net cost of the materials and equipment delivered and unloaded at the site, and all applicable taxes. The Contractor's handling costs on the site, labor, installation costs, overhead, profit and other expenses contemplated for the original allowance shall be included in the Contract Sum and not in the allowance. The Contractor shall cause the Work covered by these allowances to be performed for such amounts and by such persons as the Architect may direct, but he will not be required to employ persons against whom he makes a reasonable objection. If the cost, when determined, is more than or less than the allowance, the Contract Sum shall be adjusted accordingly by Change Order which will in-

clude additional handling costs on the site, labor, installation costs, overhead, profit and other expenses resulting to the Contractor from any increase over the original allowance.

4.9 SUPERINTENDENT

4.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during the progress of the Work. The superintendent shall be satisfactory to the Architect, and shall not be changed except with the consent of the Architect, unless the superintendent proves to be unsatisfactory to the Contractor and ceases to be in his employ. The superintendent shall represent the Contractor and all communications given to the superintendent shall be as binding as if given to the Contractor. Important communications will be confirmed in writing. Other communications will be so confirmed on written request in each case.

4.10 RESPONSIBILITY FOR THOSE PERFORMING THE WORK

4.10.1 The Contractor shall be responsible to the Owner for the acts and omissions of all his employees and all Subcontractors, their agents and employees, and all other persons performing any of the Work under a contract with the Contractor.

4.11 PROGRESS SCHEDULE

4.11.1 The Contractor, immediately after being awarded the Contract, shall prepare and submit for the Architect's approval an estimated progress schedule for the Work. The progress schedule shall be related to the entire Project to the extent required by the Contract Documents. This schedule shall indicate the dates for the starting and completion of the various stages of construction and shall be revised as required by the conditions of the Work, subject to the Architect's approval.

4.12 DRAWINGS AND SPECIFICATIONS AT THE SITE

4.12.1 The Contractor shall maintain at the site for the Owner one copy of all Drawings, Specifications, Addenda, approved Shop Drawings, Change Orders and other Modifications, in good order and marked to record all changes made during construction. These shall be available to the Architect. The Drawings, marked to record all changes made during construction, shall be delivered to him for the Owner upon completion of the Work.

4.13 SHOP DRAWINGS AND SAMPLES

4.13.1 Shop Drawings are drawings, diagrams, illustrations, schedules, performance charts, brochures and other data which are prepared by the Contractor or any Subcontractor, manufacturer, supplier or distributor, and which illustrate some portion of the Work.

4.13.2 Samples are physical examples furnished by the Contractor to illustrate materials, equipment or workmanship, and to establish standards by which the Work will be judged.

4.13.3 The Contractor shall review, stamp with his approval and submit, with reasonable promptness and in orderly sequence so as to cause no delay in the Work or in the work of any other contractor, all Shop Drawings and Samples required by the Contract Documents or subsequently by the Architect as covered by Modifications. Shop Drawings and Samples shall be properly identified as specified, or as the Architect may require. At the time of submission the Contractor shall inform the Architect in writing of any deviation in Shop Drawings or Samples from the requirements of the Contract Documents.

4.13.4 By approving and submitting Shop Drawings and Samples, the Contractor thereby represents that he has determined and verified all field measurements, field construction criteria, materials, catalog numbers and similar

data, or will do so, and that he has checked and coordinated each Shop Drawing and Sample with the requirements of the Work and of the Contract Documents.

4.13.5 The Architect will review and approve Shop Drawings and Samples with reasonable promptness so as to cause no delay, but only for conformance with the design concept of the Project and with the information given in the Contract Documents. The Architect's approval of a separate item shall not indicate approval of an assembly in which the item functions.

4.13.6 The Contractor shall make any corrections required by the Architect and shall submit the required number of corrected copies of Shop Drawings or new Samples until approved. The Contractor shall direct specific attention in writing or on resubmitted Shop Drawings to revisions other than the corrections requested by the Architect on previous submissions.

4.13.7 The Architect's approval of Shop Drawings or Samples shall not relieve the Contractor of responsibility for any deviation from the requirements of the Contract Documents unless the Contractor has informed the Architect in writing of such deviation at the time of submission and the Architect has given written approval to the specific deviation, nor shall the Architect's approval relieve the Contractor from responsibility for errors or omissions in the Shop Drawings or Samples.

4.13.8 No portion of the Work requiring a Shop Drawing or Sample submission shall be commenced until the submission has been approved by the Architect. All such portions of the Work shall be in accordance with approved Shop Drawings and Samples.

4.14 USE OF SITE

4.14.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with any materials or equipment.

4.15 CUTTING AND PATCHING OF WORK

4.15.1 The Contractor shall do all cutting, fitting or patching of his Work that may be required to make its several parts fit together properly, and shall not endanger any Work by cutting, excavating or otherwise altering the Work or any part of it.

4.16 CLEANING UP

4.16.1 The Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by his operations. At the completion of the Work he shall remove all his waste materials and rubbish from and about the Project as well as all his tools, construction equipment, machinery and surplus materials, and shall clean all glass surfaces and leave the Work "broom-clean" or its equivalent, except as otherwise specified.

4.16.2 If the Contractor fails to clean up, the Owner may do so and the cost thereof shall be charged to the Contractor as provided in Paragraph 3.4.

4.17 COMMUNICATIONS

4.17.1 The Contractor shall forward all communications to the Owner through the Architect.

4.18 INDEMNIFICATION

4.18.1 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expenses (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negli-

gent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

4.18.2 In any and all claims against the Owner or the Architect or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph 4.18 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

4.18.3 The obligations of the Contractor under this Paragraph 4.18 shall not extend to the liability of the Architect, his agents or employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys. Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 5

SUBCONTRACTORS

5.1 DEFINITION

5.1.1 A Subcontractor is a person or organization who has a direct contract with the Contractor to perform any of the Work at the site. The term Subcontractor is referred to throughout the Contract Documents as if singular in number and masculine in gender and means a Subcontractor or his authorized representative.

5.1.2 A Sub-subcontractor is a person or organization who has a direct or indirect contract with a Subcontractor to perform any of the Work at the site. The term Sub-subcontractor is referred to throughout the Contract Documents as if singular in number and masculine in gender and means a Sub-subcontractor or an authorized representative thereof.

5.1.3 Nothing contained in the Contract Documents shall create any contractual relation between the Owner or the Architect and any Subcontractor or Sub-subcontractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise specified in the Contract Documents or in the Instructions to Bidders, the Contractor, as soon as practicable after the award of the Contract, shall furnish to the Architect in writing for acceptance by the Owner and the Architect a list of the names of the Subcontractors proposed for the principal portions of the Work. The Architect shall promptly notify the Contractor in writing if either the Owner or the Architect, after due investigation, has reasonable objection to any Subcontractor on such list and does not accept him. Failure of the Owner or Architect to make objection promptly to any Subcontractor on the list shall constitute acceptance of such Subcontractor.

5.2.2 The Contractor shall not contract with any Subcontractor or any person or organization (including those who are to furnish materials or equipment fabricated to a special design) proposed for portions of the Work designated in the Contract Documents or in the instructions to Bidders or, if none is no designated, with any Subcontractor proposed for the principal portions of the Work who has been rejected by the Owner and the Architect. The Contractor will not be required to contract with any Subcontractor or person or organization against whom he has a reasonable objection.

5.2.3 If the Owner or Architect refuses to accept any Subcontractor or person or organization on a list submitted by the Contractor in response to the requirements of the Contract Documents or the instructions to Bidders, the Contractor shall submit an acceptable substitute and the Contract Sum shall be increased or decreased by the difference in cost occasioned by such substitution and an Appropriate Change Order shall be issued; however, no increase in the Contract Sum shall be allowed for any such substitution unless the Contractor has acted promptly and responsively in submitting for acceptance any list or lists of names as required by the Contract Documents or the instructions to Bidders.

5.2.4 If the Owner or the Architect requires a change of any proposed Subcontractor or person or organization previously accepted by them, the Contract Sum shall be increased or decreased by the difference in cost occasioned by such change and an appropriate Change Order shall be issued.

5.2.5 The Contractor shall not make any substitution for any Subcontractor or person or organization who has been accepted by the Owner and the Architect, unless the substitution is acceptable to the Owner and the Architect.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 All work performed for the Contractor by a Subcontractor shall be pursuant to an appropriate agreement between the Contractor and the Subcontractor (and where appropriate between Subcontractors and Sub-subcontractors) which shall contain provisions that:

.1 preserve and protect the rights of the Owner and the Architect under the Contract with respect to the Work to be performed under the subcontract so that the subcontracting thereof will not prejudice such rights;

.2 require that such Work be performed in accordance with the requirements of the Contract Documents;

.3 require submission to the Contractor of applications for payment under each subcontract to which the Contractor is a party, in reasonable time to enable the Contractor to apply for payment in accordance with Article 9;

.4 require that all claims for additional costs, extensions of time, damages for delays or otherwise with respect to subcontracted portions of the Work shal be submitted to the Contractor (via any Subcontractor or Sub-subcontractor where appropriate) in sufficient time so that the Contractor may comply in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner;

5. waive all rights the contracting parties may have against one another for damages caused by fire or other perils covered by the property insurance described in Paragraph 11.3 except such rights as they may have to the proceeds of such insurance held by the Owner as trustee under Paragraph 11.3; and

.6 obligate such Subcontractor specifically to consent to the provisions of this Paragraph 5.3.

5.4 PAYMENTS TO SUBCONTRACTORS

5.4.1 The Contractor shall pay each Subcontractor, upon receipt of payment from the Owner, an amount equal to the percentage of completion allowed to the Contractor on account of such Subcontractor's Work, less the percentage retained from payments to the Contractor. The Contractor shall also require each Subcontractor to make similar payments to his subcontractors.

5.4.2 If the Architect fails to issue a Certificate for Payment for any cause which is the fault of the Contractor

and not the fault of a particular Subcontractor, the Contractor shall pay that Subcontractor on demand, made at any time after the Certificate for Payment should otherwise have been issued, for his Work to the extent completed, less the retained percentage.

5.4.3 The Contractor shall pay each Subcontractor a just share of any insurance moneys received by the Contractor under Article 11, and he shall require each Subcontractor to make similar payments to his subcontractors.

5.4.4 The Architect may, on request and at his discretion, furnish to any Subcontractor, if practicable, information regarding percentages of completion certified to the Contractor on account of Work done by such Subcontractors.

5.4.5 Neither the Owner nor the Architect shall have any obligation to pay or to see to the payment of any moneys to any Subcontractor except as may otherwise be required by law.

ARTICLE 6

SEPARATE CONTRACTS

6.1 OWNER'S RIGHT TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to award other contracts in connection with other portions of the Project under these or similar Conditions of the Contract.

6.1.2 When separate contracts are awarded for different portions of the Project, "the Contractor" in the contract documents in each case shall be the contractor who signs each separate contract.

6.2 MUTUAL RESPONSIBILITY OF CONTRACTORS

6.2.1 The Contractor shall afford other contractors reasonable opportunity for the introduction and storage of

their materials and equipment and the execution of their work, and shall properly connect and coordinate his Work with theirs.

6.2.2 If any part of the Contractor's Work depends for proper execution or results upon the work of any other separate contractor, the Contractor shall inspect and promptly report to the Architect any apparent discrepancies or defects in such work that render it unsuitable for such proper execution and results. Failure of the Contractor so to inspect and report shall constitute an acceptance of the other contractor's work as fit and proper to receive his Work, except as to defects which may develop in the other separate contractor's work after the execution of the Contractor's Work.

6.2.3 Should the Contractor cause damage to the work or property of any separate contractor on the Project, the Contractor shall, upon due notice, settle with such other contractor by agreement or arbitration, if he will so settle. If such separate contractor sues the Owner or initiates an arbitration proceeding on account of any damage alleged to have been so sustained, the Owner shall notify the Contractor who shall defend such proceedings at the Owner's expense, and if any judgment or award against the Owner arises therefrom the Contractor shall pay or satisfy it and shall reimburse the Owner for all attorneys' fees and court or arbitration costs which the Owner has incurred.

6.3 CUTTING AND PATCHING UNDER SEPARATE CONTRACTS

6.3.1 The Contractor shall be responsible for any cutting, fitting and patching that may be required to complete his Work except as otherwise specifically provided in the Contract Documents. The Contractor shall not endanger any work of any other contractors by cutting, excavating or otherwise altering any work and shall not

cut or alter the work of any other contractor except with the written consent of the Architect.

6.3.2 Any costs caused by defective or ill-timed work shall be borne by the party responsible therefor.

6.4 OWNER'S RIGHT TO CLEAN UP

6.4.1 If a dispute arises between the separate contractors as to their responsibility for cleaning up as required by Paragraph 4.16, the Owner may clean up and charge the cost thereof to the several contractors as the Architect shall determine to be just.

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 GOVERNING LAW

7.1.1 The Contract shall be governed by the law of the place where the Project is located.

7.2 SUCCESSORS AND ASSIGNS

7.2.1 The Owner and the Contractor each binds himself, his partners, successors, assigns and legal representatives to the other party hereto and to the partners, successors, assigns and legal representatives of such other party in respect to all covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Owner.

7.3 WRITTEN NOTICE

7.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or member

of the firm or to an officer of the corporation for whom it was intended, or if delivered at or sent by registered or certified mail to the last business address known to him who gives the notice.

7.4 CLAIMS FOR DAMAGES

7.4.1 Should either party to the Contracts suffer injury or damage to person or property because of any act or omission of the other party or of any of his employees, agents or others for whose acts he is legally liable, claim shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

7.5 PERFORMANCE BOND AND LABOR AND MATERIAL PAYMENT BOND

7.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering the faithful performance of the Contract and the payment of all obligations arising thereunder if and as required in the instruction to Bidders or elsewhere in the Contract Documents.

7.6 RIGHTS AND REMEDIES

7.6.1 The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.

7.7 ROYALTIES AND PATENTS

7.7.1 The Contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof, except that the Owner shall be responsible for all such loss when a particular design, process or the product of a particular manufacturer or

manufacturers is specified, but if the Contractor has reason to believe that the design, process or product specified is an infringement of a pttent, he shall be responsible for such loss unless he promptly gives such information to the Architect.

7.8 TESTS

7.8.1 If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any Work to be inspected, tested or approved, the Contractor shall give the Architect timely notice of its readiness and of the date arranged so the Architect may observe such inspection, testing or approval. The Contractor shall bear all costs of such inspections, tests and approvals unless otherwise provided.

7.8.2 If after the commencement of the Work the Architect determines that any Work requires special inspection, testing, or approval which Subparagraph 7.8.1 does not include, he will, upon written authorization from the Owner, instruct the Contractor to order such special inspection, testing or approval, and the Contractor shall give notice as in Subparagraph 7.8.1. If such special inspection or testing reveals a failure of the Work to comply (1) with the requirements of the Contract Documents or (2) with respect to the performance of the Work, with laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, the Contractor shall bear all costs thereof, including the Architect's additional services made necessary by such failure: otherwise the Owner shall bear such costs, and an appropriate Change Order shall be issued.

7.8.3 Required certificates of inspection, testing or approval shall be secured by the Contractor and promptly delivered by him to the Architect.

7.8.4 If the Architect wishes to observe the inspections, tests or approvals required by this Paragraph 7.8, he will do so promptly and, where practicable, at the source of supply.

7.8.5 Neither the observations of the Architect in his Administration of the Construction Contract, nor inspections, tests or approvals by persons other than the Contractor shall relieve the Contractor from his obligations to perform the Work in accordance with the Contract Documents.

7.9 INTEREST

7.9.1 Any moneys not paid when due to either party under this Contract shall bear interest at the legal rate in force at the place of the Project.

7.10 ARBITRATION

7.10.1 All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, except as set forth in Subparagraph 229 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 975 and 976 shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

7.10.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and

with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits specified in Subparagraphs 2.210 and 2.211 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on each claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.10.3 The Contractor shall carry on the Work and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by him and the Owner in writing.

ARTICLE 8

TIME

8.1 DEFINITIONS

8.1.1 The Contract Time is the period of time alloted in the Contract Documents for completion of the Work.

8.1.2 The date of commencement of the Work is the date established in a notice to proceed. If there is no notice to proceed, it shall be the date of the Agreement or such other date as may be established therein.

8.1.3 The Date of Substantial Completion of the Work or designated portion thereof is the Date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Document, so the Owner may occupy the Work or designated portion thereof for the use for which it is intended.

8.1.4 The term day as used in the Contract Documents shall mean calendar day.

8.2 PROCESS AND COMPLETION

8.2.1 All time limits stated in the Contract Documents are of the essence of the Contract.

8.2.2 The Contractor shall begin the Work on the date of commencement as defined in Subparagraph 8.1.2. He shall carry the Work forward expeditiously with adequate forces and shall complete it within the Contract Time.

8.2.3 If a date or time of completion is included in the Contract, it shall be the Date of Substantial Completion as defined in Subparagraph 8.1.3, including authorized extensions thereto, unless otherwise provided.

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner or the Architect, or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by any cause which the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 All claims for extension of time shall be made in writing to the Architect no more than twenty days after the occurrence of the delay; otherwise they shall be waived. In the case of a continuing cause of delay only one claim is necessary.

8.3.3 If no schedule or agreement is made stating the dates upon which written interpretations as set forth in Subparagraph 1.2.5 shall be furnished, then no claim for

delay shall be allowed on account of failure to furnish such interpretations until fifteen days after demand is made for them, and not then unless such claim is reasonable.

8.3.4 This Paragraph 8.3 does not exclude the recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9

PAYMENTS AND COMPLETION

9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and is the total amount payable by the Owner to the Contractor for the performance of the Work under the Contract Documents.

9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values of the various portions of the Work, including quantities if required by the Architect, aggregating the total Contract Sum, divided so as to facilitate payments to Subcontractors in accordance with Paragraph 5.4 prepared in such form as specified or as the Architect and the Contractor may agree upon, and supported by such data to substantiate its correctness as the Architect may require. Each item in the schedule of values shall include its proper share of overhead and profit. This schedule, when approved by the Architect, shall be used only as a basis for the Contractor's Applications for Payment.

9.3 PROGRESS PAYMENTS

9.3.1 At least ten days before each progress payment falls due, the Contractor shall submit to the Architect an

itemized Application for Payment, supported by such data substantiating the Contractor's right to payment as the Owner or the Architect may require.

9.3.2 If payments are to be made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site, or at some other location agreed upon in writing, such payments shall be conditioned upon submission by the Contractor of bills of sale or such other procedures satisfactory to the Owner to establish the Owner's title to such materials or equipment or otherwise protect the Owner's interest including applicable insurance and transportation to the site.

9.3.3 The Contractor warrants and guarantees that title to all Work, materials and equipment covered by an Application for Payment, whether incorporated in the Project or not, will pass to the Owner upon the receipt of such payment by the Contractor, free and clear of all liens, claims, security interests or encumbrances hereinafter referred to in this Article 9 as "liens"; and that no Work, materials or equipment covered by an Application for Payment will have been acquired by the Contractor; or by any other person performing the Work at the site or furnishing materials and equipment for the Project, subject to an agreement under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor or such other person.

9.4 CERTIFICATE FOR PAYMENT

9.4.1 If the Contractor has made Application for Payment as above, the Architect will, with reasonable promptness but not more than seven days after the receipt of the Application, issue a Certificate for Payment to the Owner, with a copy to the Contractor, for such amount as he determines to be properly due, or state in writing his reasons for withholding a Certificate as provided in Subparagraph 9.5.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on his observations at the site as provided in Subparagraph 2.2.4 and the data comprising the Application for Payment, that the Work has progressed to the point indicated; that, to the best of his knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to the results of any subsequent tests required by the Contract Documents, to minor deviaitons from the Contract Documents correctable prior to completion, and to any specific qualifications stated in his Certificate); and that the Contractor is entitled to payment in the amount certified. In addition, the Architect's final Certificate for Payment will constitute a further representation that the conditions precedent to the Contractor's being entitled to final payment as set forth in Subparagraph 9.7.2 have been fulfilled. However, by issuing a Certificate for Payment, the Architect shall not thereby be deemed to represent that he has made exhaustive or continuous on-site inspections to check the quality or quantity of the Work or that he has reviewed the construction means, methods, techniques, sequences or procedures, or that he has made any examination to ascertain how or for what purpose the Contractor has used the moneys previously paid on account of the Contract Sum.

9.4.3 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner provided in the Agreement.

9.4.4 No certificate for a progress payment, nor any progress payment, or any partial or entire use or occupancy of the Project by the Owner, shall constitute an acceptance of any Work not in accordance with the Contract Documents.

9.3 PAYMENTS WITHHELD

9.5.1 The Architect may decline to approve an Application for Payment and may withhold his Certificate in whole or in part, to the extent necessary reasonably to protect the Owner, if in his opinion he is unable to make representation to the Owner as provided in Subparagraph 9.4.2. The Architect may also decline to approve any Applications for Payment or, because of subsequently discovered evidence or subsequent inspections, he may nullify the whole or any part of any Certificate for Payment previously issue, to such extent as may be necessary in his opinion to protect the Owner from loss because of:

.1 defective work not remedied,

.2 third party claims filed or reasonable evidence indicating probable filing of such claims,

.3 failure of the Contractor to make payments properly to Subcontractors or for Labor, materials or equipment,

.4 reasonable doubt that the Work can be completed for the unpaid balance of the Contract Sum,

.5 damage to another contractor,

.6 reasonable indication that the Work will not be completed within the Contract Time, or,

.7 unsatisfactory prosecution of the Work by the Contractor.

9.5.2 When the above grounds in Subparagraph 9.5.1 are removed, payment shall be made for amount withheld because of them.

9.6 FAILURE OF PAYMENT

9.6.1 If the Architect should fail to issue any Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner should fail to pay the Contractor within seven days after the date of payment established in the Agreement any amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and the Architect, stop the Work until payment of the amount owing has been received.

9.7 SUBSTANTIAL COMPLETION AND FINAL PAYMENT

9.7.1 When the Contractor determines that the Work or a designated portion thereof acceptable to the Owner is substantially complete, the Contractor shall prepare for submission to the Architect a list of items to be completed or corrected. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. When the Architect on the basis of an inspection determines that the Work is substantially complete, he will then prepare a Certificate of Substantial Completion which shall establish the Date of Substantial Completion, shall state the responsibilities of the Owner and the Contractor for maintenance, heat, utilities, and insurance, and shall fix the time within which the Contractor shall complete the items listed therein. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate.

9.7.2 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon re-

ceipt of a final Application for Payment, the Architect will promptly make such inspection and, when he finds the Work acceptable under the Contract Documents and the Contract fully performed, he will promptly issue a final Certificate for Payment stating that to the best of his knowledge, information and belief, and on the basis of his observations and inspections, the Work has been completed in accordance with the terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor, and noted in said final Certificate, is due and payable.

9.7.3 Neither the final payment nor the remaining retained percentage shall become due until the Contractor submits to the Architect (1) an Affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or his property might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety, if any, to final payment and (3), if required by the Owner, other data establishing payment or satisfaction of all such obligations, such as receipts, releases and waivers of liens arising out of the Contract, to the extent and in such form as may be designated by the Owner. If any Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify him against any such lien. If any such lien remains unsatisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.7.4 If after Substantial Completion of the Work final completion thereof is materially delayed through no fault of the Contractor, and the Arctitect so confirms, the Owner shall, upon certification by the Architect, and with-

out terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than the retainage stipulated in the Agreement, and if bonds have been furnished as required in Subparagraph 7.5.1, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.7.5 The making of final payment shall constitute a waiver of all claims by the Owner except those arising from:

.1 unsettled liens,

.2 faulty or defective Work appearing after Substantial Completion,

.3 failure of the Work to comply with the requirements of the Contract Documents, or

.4 terms of any special guarantees required by the Contract Documents.

9.7.6 The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and still unsettled.

ARTICLE 10

PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

.1 all employee on the Work and all other persons who may be affected thereby;

.2 all the Work and all materials and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of the Contractor or any of his Subcontractors or Sub-subcontractors; and

.3 other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. He shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities.

10.2.3 When the use or storage of explosives or other hazardous materials or equipment is necessary for the execution of the Work, the Contractor shall exercise the utmost care and shall carry on such activities under the supervision of properly qualified personnel.

10.2.4 All damage or loss to any property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, any Subcontractor, or any Sub-subcontractor, or anyone directly or indirectly employed by any

of them, or by anyone for whose acts any of them may be liable, shall be remedied by the Contractor, except damages or loss attributable to faulty Drawings or Specifications or to the acts or omissions of the Owner or Architect or any employed by either of them or for whose acts either of them may be liable, and not attributable to the fault or neglect of the Contractor.

10.2.5 The Contractor shall designate a responsible member of his organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated in writing by the Contractor to the Owner and the Architect.

10.2.6 The Contractor shall not load or permit any part of the Work to be loaded so as to endanger its safety.

10.3 EMERGENCIES

10.3.1 In any emergency affecting the safety of persons or property, the Contractor shall act, at his discretion, to prevent threatened damage, injury or loss. Any additional compensation or extension of time claimed by the Contractor on account of emergency work shall be determined as provided in Article 12 for Changes in the Work.

ARTICLE 11

INSURANCE

11.1 CONTRACTORS LIABILITY INSURANCE

11.1.1 The Contractor shall purchase and maintain such insurance as will protect him from claims set forth below which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

.1 claims under workmen's compensation, disability benefit and other similar employee benefit acts;

.2 claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees;

.4 claims for damages insured by usual personal injury liability coverage which are sustained (1) by any person as a result of an offense directly or indirectly related to the employment of such person by the Contractor, or (2) by any other person; and

.5 claims for damages because of injury to or destruction of tangible property, including loss of use resulting therefrom.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than any limits of liability specified in the Contract Documents, or required by law, whichever is greater, and shall include contractual liability insurance as applicable to the Contractor's obligations under Paragraph 4.18.

11.1.3 Certificate of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These Certificates shall contain a provision that coverages afforded under the policies will not be cancelled until at least fifteen days' prior written notice has been given to the Owner.

11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining his own liability insurance and, at his option, may purchase and maintain such insurance as will protect him against claims which may arise from operations under the Contract.

11.3 PROPERTY INSURANCE

11.3 Unless otherwise provided, the Owner shall purchase and maintain property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of Fire, Extended Coverage, Vandalism and Malicious Mischief.

11.3.2 The Owner shall purchase and maintain such steam boiler and machinery insurance as may be required by the Contract Documents or by law. This insurance shall include the interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work.

11.3.3 Any insured loss is to be adjusted with the Owner and made payable to the Owner as trustee for the insureds, as their interests may appear, subject to the requirements of any applicable martgage clause and of Subparagraph 11.3.8.

11.3.4 The Owner shall file a copy of all policies with the Contractor before an exposure to loss may occur. If the Owner does not intend to purchase such insurance, he shall inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of himself, his Subcontractors and the Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by failure of the Owner to purchase or maintain such insurance and so to notify the Contractor, then the Owner shall bear all reasonable costs property attributable thereto.

11.3.5 If the Contractor requests in writing that insurance for special hazards be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

11.3.6 The Owner and Contractor waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under this Paragraph 11.3 except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The Contractor shall require similar waivers by Subcontractors and Sub-subcontractors in accordance with Clause 5.3.1.5.

11.3.7 If required in writing by any party in interest, the Owner as trustee shall, upon the occurrence of an insured loss, give bond for the proper performance of his duties. He shall deposit in a separate account any money so received, and he shall distribute it in accordance with such agreement as the parties in interest may reach, or in accordance with an award by arbitration in which case the procedure shall be as provided in Paragraph 7.10. If after such loss no other special agreement is made, replacement of damaged work shall be covered by an appropriate Change Order.

11.3.8 The Owner as trustee shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within five days after the occurrence of loss to the Owner's exercise of this power, and if such objection be made, arbitrators shall be chosen as provided in Paragraph 7.10. The Owner as trustee shall, in that case, make settlement with the insurers in accordance with the directions of such arbitrators. If distribution of the insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

11.4 LOSS OF USE INSURANCE

11.4.1 The Owner, at his option, may purchase and maintain such insurance as will insure him against loss of use of his property due to fire or other hazards, however caused.

ARTICLE 12

CHANGES IN THE WORK

12.1 CHANGE ORDERS

12.1.1 The Owner without invalidating the Contract, may order Changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. All such Changes in the Work shall be authorized by Change Order, and shall be executed under the applicable conditions of the Contract Documents.

12.1.2 A Change Order is a written order to the Contractor signed by the Owner and the Architect, issued after the execution of the Contract, authorizing a Change in the Work or an adjustment in the Contract Sum or the Contract Time. Alternatively, the Change Order may be signed by the Architect alone, provided he has written authority from the Owner for such procedure and that a copy of such written authority is furnished to the Contractor upon request. A Change Order may also be signed by the Contractor if he agrees to the adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order.

12.1.3 The cost or credit to the Owner resulting from a Change in the Work shall be determined in one or more of the following ways:

.1 by mutual acceptance of a lump sum properly itemized:

.2 by unit prices stated in the Contract Documents or subsequently agreed upon; or

.3 by cost and a mutually acceptable fixed or percentage fee.

12.1.4 If none of the methods set forth a Subparagraph 12.1.3 is agreed upon, the Contractor, provided he receives a Change Order, shall promptly proceed with the Work involved. The cost of such Work shall then be determined by the Architect on the basis of the Contractor's reasonable expenditures and savings, including, in the case of an increase in the Contract Sum, a reasonable allowance for overhead and profit, in such case, and also under Clause 12.1.3.3 above, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Pending final determination of cost to the Owner, payments on account shall be made on the Architect's Certificate for Payment. The amount of credit to be allowed by the Contractor to the Owner for any deletion or change with results in a net decrease in cost will be the amount of the actual net decrease as confirmed by the Architect. When both additions and credits are involved in any one change, the allowance for overhead and profit shall be figured on the basis of net increase, if any.

12.1.5 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if the quantities originally contemplated are so changed in a proposed Change Order that application of the agreed unit prices to the quantities of Work proposed will create a hardship on the Owner or the Contractor, the applicable unit prices shall be equitably adjusted to prevent such hardship.

12.1.6 Should concealed conditions encountered in the performance of the Work below the surface of the ground be at variance with the conditions indicated by the Contract Documents or should unknown physical conditions below the surface of the ground of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract, be encountered, the Con-

tract Sum shall be equitably adjusted by Change Order upon claim by either party made within twenty days after the first observance of the conditions.

12.1.7 If the Contractor claims that additional cost is involved because of (1) any written interpretation issued pursuant to Subparagraph 1.2.5 (2) any order by the Owner to stop the Work pursuant to Paragraph 3.3 where the Contractor was not at fault, or (3) any written order for a minor change in the Work issued pursuant to Paragraph 12.3, the Contractor shall make such claim as provided in Paragraph 12.2.

12.2 CLAIMS FOR ADDITIONAL COST

12.2.1 If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before preceeding to execute the Work, except in emergency endangering life or property in which case the Contractor shall proceed in accordance with Subparagraph 10.3.1. No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum, it shall be determined by the Architect. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.

12.3 MINOR CHANGES IN THE WORK

12.3.1 The Architect shall have authority to order minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes may be effected by Field Order or by other written order. Such changes shall be binding on the Owner and the Contractor.

12.4 FIELD ORDERS

12.4.1 The Architect may issue written Field Orders which interpret the Contract Documents in accordance with Subparagraph 1.2.5 or which order minor changes in the Work in accordance with Paragraph 12.3 without change in Contract Sum or Contract Time. The Contractor shall carry out such Field Orders promptly.

ARTICLE 13

UNCOVERING AND CORRECTION OF WORK

13.1 UNCOVERING OF WORK

13.1.1 If any Work should be covered contrary to the request of the Architect, it must, if required by the Architect, be uncovered for his observation and replaced, at the Contractor's expense.

13.1.2 If any other Work has been covered which the Architect has not specifically requested to observe prior to being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work be found in accordance with the Contract Documents, the cost of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work be found not in accordance with the Contract Document, the Contractor shall pay such costs unless it be found that this condition was caused by a separate contractor employed as provided in Article 6, and in that event the Owner shall be responsible for the payment of such costs.

13.2 CORRECTION OF WORK

13.2.1 The Contractor shall promptly correct all Work rejected by the Architect as defective or as failing to conform to the Contract Documents whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor

shall bear all cost of correcting such rejected Work, including the cost of the Architect's additional services thereby made necessary.

13.2.2 If, within one year after the Date of Substantial Completion or within such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the Contract Documents, any of the Work is found to be defective or not in accordance with the Contract Documents, the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition.

13.2.3 All such defective or non-conforming Work under Subparagraphs 13.2.1 and 13.2.2 shall be removed from the site if necessary, and the Work shall be corrected to comply with the Contract Documents without cost to the Owner.

13.2.4 The Contractor shall bear the cost of making good all work of separate contractors destroyed or damaged by such removal or correction.

13.2.5 If the Contractor does not remove such defective or non-conforming Work within a reasonable time fixed by written notice from the Architect, the Owner may remove it and may store the materials or equipment at the expense of the Contractor. If the Contractor does not pay the cost of such removal and storage within ten days thereafter, the Owner may upon ten additional days' written notice sell such Work at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs that should have been borne by the Contractor including compensation for additional architectural services. If such proceeds of sale do not cover all costs which the Contractor should have borne, the difference shall be charged to the Contractor

and an appropriate Change Order shall be issued. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

13.2.6 If the Contractor fails to correct such defective or non-conforming Work, the Owner may correct it in accordance with Paragraph 3.4.

13.3 ACCEPTANCE OF DEFECTIVE OR NON-CONFORMING WORK

13.3.1 If the Owner prefers to accept defective or non-conforming Work, he may do so instead of requiring its removal and correction, in which case a Change Order will be issued to reflect an appropriate reduction in the Contract Sum, or, if the amount is determined after final payment, it shall be paid by the Contractor.

ARTICLE 14

TERMINATION OF THE CONTRACT

14.1 TERMINATION BY THE CONTRACTOR

14.1.1 If the Work is stopped for a period of thirty days under an order of any court or other public authority having jurisdiction, or as a result of any act of government, such as a declaartion of a national emergency making materials unavailable, through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing any of the Work under a contract with the Contractor, or if the Work should be stopped for a period of thirty days by the Contractor for the Architect's failure to issue a Certificate for Payment as provided in Paragraph 9.6 or for the Owner's failure to make payment thereon as provided in Paragraph 9.6, then the Contractor may, upon seven days' written notice of the Owner and the Architect, terminate the Contract and recover from the Owner pay-

ment for all Work executed and for any proven loss sustained upon any materials, equipment, tools, construction equipment and machinery, including reasonable profit and damages.

14.2 TERMINATION BY THE OWNER

14.2.1 If the Contractor is adjudged a bankrupt, or if he makes a general assignment for the benefit of his creditors, or if a receiver is appointed on account of his insolvency, or if he persistently or repeatedly refuses or fails, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he fails to make prompt payment to Subcontractors or for materials or labor, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a substantial violation of a provision of the Contract Documents, then the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may, without prejudice to any right or remedy and after giving the Contractor and his surety, if any, seven days' written notice, terminate the employment of the Contractor and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever methods he may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the Work is finished.

14.2.2 If the unpaid balance of the Contract Sum exceeds the costs of finishing the Work, including compensation for the Architect's adidtional services, such excess shall be paid to the Contractor. If such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The costs incurred by the Owner as herein provided shall be certified by the Architect.

NOTICE

All modifications, additions, amplifications, special conditions, etc., hereinafter appearing as supplementary conditions shall be included in, and made a part of, the April 1970 edition of AIA Document A201, entitled "General Conditions of the Contract for Construction", and containing Articles 1 through 14, inclusive, as bound into the Project Manual.

ARTICLE 15—MODIFICATIONS TO GENERAL CONDITIONS

The modifications to General Conditions contain changes and additions to the General Conditions. Where no part of the General Conditions is changed or voided, the unaltered provisions shall remain in effect.

15.1 Modifications and Additions to ARTICLE 1—CONTRACT DOCUMENTS

1.3.1 Modify the sub-paragraph to read: "The Contractor will be furnished 20 sets of project drawings and project manual, including specifications, free of charge. Additional sets may be purchased by the Contractor at cost of reproduction."

15.2 Modification to ARTICLE 2—ARCHITECT

2.2.12 First line, after "Architect" add: "and/or Owner".

2.2.16 Delete the entire sub-paragraph.

15.3 Modifications and Additions to ARTICLE 4—CONTRACTOR

4.3.1 Expand sub-paragraph by adding: "This supervision shall be applied on a full-time

basis, shall extend to all levels and phases of the Contract, and shall continue through to the final disposition of the Punch List."

4.7.1 Delete the first sentence and substitute: "The Contractor shall secure and pay for all certificates, inspections and other legal fees necessary, both permanent and temporary, including plumbing, electrical and highway permits, for the proper execution and completion of the work and which are applicable at the time the bids are received. The Owner will secure and pay for the building permit and provide it to the Contractor without charge. All Sanitary sewer assessments, water availability charges, and service connection charges, including meter cost, will be paid by Owner."

4.7.3 New sub-paragraph: "Contractor shall include in the work, without additional cost to the Owner, any labor, materials, services, apparatus, drawings (in addition to the Contract Documents), required to comply with all applicable laws, ordinances, rules, and regulations, whether or not shown or specified."

4.11.1 Amplify the sub-paragraph by adding: "The Progress Schedule shall be prepared on forms secured from the Owner and four copies shall be submitted to the Architect within thirty (30) days from the date of Notice to Proceed, and prior to submitting the first application for progress payment."

4.12.2 New sub-paragraph: "Among the documents to be maintained at the site, the Contractor shall include the Fairfax County

'Approved' building permit drawings and specifications. These documents shall be protected, preserved, and transferred to the Owner at Project Closeout."

4.13.3 Modify the sub-paragraph to read.: "The Contractor shall review in detail, and if in accordance with the requirements of the Contract, approve and submit within fifteen (15) days from date of subcontract award, all Shop Drawings, Product Data, and Samples required by the Contract Documents. All submittals shall issue from the Contractor; the Architect will not accept any submittals from Subcontractors or Suppliers. Submit 8 sets of Architectural Shop Drawings; 3 sets will be retained. Submit 8 sets of Structural, Mechanical, and Electric Shop Drawings; 4 sets will be retained.

4.13.8 Expand sub-paragraph by adding: "Any materials or equipment installed prior to required Shop Drawing, Product Data, or Sample approval, shall be subject to removal and replacement by the Contractor at no additional cost to the Owner, if in the opinion of the Architect, such materials or equipment do not meet the requirements of the drawings and specifications."

4.16.1 Modify the sub-paragraph to read: "The Contractor shall be totally responsible for periodic cleaning up of the Contract premises. In addition to general broom cleaning, he shall remove all refuse, waste materials, and debris of all types regardless of who may have left same. All such refuse shall be removed from the property of the Owner and disposed of in a legal

manner to the end that at all times the premises shall present a neat and orderly appearance to the satisfaction of the Architect and/or Owner. The definition of 'periodic' shall mean 'as necessary and/or at the direction of the Owner or his representative'. At the completion of the work the Contractor shall remove all of his tools, construction equipment, machinery, surplus materials, and other paraphernalia, and shall perform the final clean-up of the project in preparation for final inspection and Project Closeout."

4.16.2 Delete sub-paragraph and insert: "Besides the general broom cleaning and refuse removal, the Contractor shall do the following special cleaning for all trades before the final completion and acceptance of the work:

a. Remove putty stains, soilage, and paint from all glass, and wash and polish same.

b. Clean and polish all finishing hardware.

c. Remove all spots, soilage, and paint from all ceramic/structural glazed tile work.

d. Clean all plumbing fixtures, accessories, and equipment, including all mechanical equipment.

e. Clean and polish all tile, terrazzo, wood, and other finished floors; clean and vacuum all carpet.

f. Clean premises of all debris and dirt."

4.16.3 New sub-paragraph: "If the Contractor fails to clean up, the Owner may do so and the cost thereof shall be deducted from the Contract Sum as provided in Paragraph 3.4."

Add the following paragraph and sub-paragraph to Article 4:

4.19 ANTI KICK-BACK AND CONFLICT OF INTEREST PROVISIONS

4.19.1 Conflict of Interest—The provisions of the Comprehensive Conflict of Interest Act (VA. Code 2.1-599 and 634 Supp. 1983) and Aritcle IV of the Virginia Public Procurement Act entitled "Ethics in Public Contracting" (VA. Code 11.72 to 80 Supp. 1983) are incorporated herein by reference, and all Bidding Documents shall incorporate appropirate reference to these provisions. The Contractor shall incorporate the above conflict-of-interest clause into each subcontract.

15.4 Modifications and Additions to ARTICLE 5—SUBCONTRACTORS

5.2.1 Modify the sub-paragraph to read: "Except as otherwise specified in the Instructions to Bidders, the Contractor, within 10 days after the award of the Contract, shall furnish to the Architect in writing for acceptance by the Owner and the Architect a list of the names of the Subcontractors proposed for the principal portions of the Work. The list shall contain the complete name, address, and business and emergency telephone numbers of each such person or entity who is to perform services

on the project. The Architect shall promptly notify the Contractor in writing if either the Owner or the Architect, after due investigation, has reasonable objection to any Subcontractor on such list and does not accept him. Failure of the Owner or Architect to make objection promptly to any Subcontractor on the list shall constitute acceptance of such Subcontractor."

5.2.6 New sub-paragraphs: "Within 10 days of Subcontract award, evidence shall be submitted to the Architect indicating Subcontractor's acceptance of the time allotted for his portion of the work."

15.1 Modifications to ARTICLE 7—MISCELLANEOUS PROVISIONS

7.1.2 New sub-paragraph: "All phases of the work shall be executed in accordance with all applicable provisions and requirements of the current edition of the Virginia Uniform Statewide Building Code (VUSBC)."

7.4.1 Delete content and substitute: "If the Contractor claims compensation for any damage sustained by reason of any act or omission of the Scohol Board or its agents or representative, he must within five (5) days after sustaining such damage, make and deliver to the Director of the Office of Design and Construction a written statement specifying that the Contractor has sustained such damage, and detailing the basis of the claim against the School Board. Thirty (30) days later, the Contractor shall make and deliver to the Director of the Office of Design and Con-

struction an itemized breakdown of the nature and amounts of such damage, duly verified by the Contractor and notarized. This itemized breakdown shall be made to the fullest extent possible, otherwise the claim shall be deemed to be waived."

7.9 Delete the paragraph in its entirety

Delete title and content of Paragraph 7.10 and substitute:

7.10 NO DAMAGES FOR DELAYS

7.10.1 The Contractor agrees to make no claim for damages for delay in the performance of this Contract, occasioned by the act or omission to act of the School board, its agents or its representatives, regardless of the length of such delays. The Contractor further acknowledges that unanticipated delays frequently occur in any construction project and agrees that no claims for damages for delay shall be made against the School Board, its agents or representatives, whether or not such delays are anticipated. The Contractor further agrees specifically that any claim made for delay damages shall be compensated for exclusively by an extension of time within which to complete its contractual performance.

Add the following paragraph and sub-paragraph to Article 7:

7.11 CONFLICT WITH PROVISIONS OF THE CODE OF VIRGINIA

7.11.1 In the event that there is a conflict between the language of this Agreement and

that of the Code of Virginia, and specifically Title II, Chapter 7 ("Virginia Public Procurement Act"), the Code of Virginia shall control.

15.6 Modifications and Additions to ARTICLE 8—TIME

8.3.1 Expand the sub-paragraph by adding: "No time extensions will be awarded for delays resulting from bad weather unless the Contractor can produce conclusive evidence that such bad weather was abnormal for the period and that its effects were direct and detrimental to the work schedule, and resulted in the loss of a specific number of days therefrom. Any such evidence shall include complete and comparative meterological data for the area, along with corroborating statements from one or more recognized experts in the field of weather."

8.3.5 New sub-paragraph: "The Owner will suffer financial loss if the project is not substantially completed on the date set forth in the Contract Documents. The Contractor (and the Contractor's Surety) shall be liable for and pay to the Owner the sums hereinafter stipulated and fixed, agreed as liquidated damage for each calendar day of delay until the work is substantially completed."

15.7 Modifications and Additions to ARTICLE 9—PAYMENTS AND COMPLETION

9.2.1 Amplify sub-paragraph by adding: "The form for the Schedule of Values shall be the Fairfax County School Board's 'Sched-

ule of Amounts for Contract Payments' and will be obtained from the School Board's Design and Construction Department. The form shall be completed in detail including quantities and unit costs. Submit 6 copies to the Architect for approval within 30 days after award of contract, but prior to submitting the first application for progress payment."

9.3.1 Modify sub-paragraph in first sentence by changing "10 days" to read "15 days," and add to the sub-paragraph: "On or about the 25th day of each month, the Contractor shall meet with the Inspector and/or Architect to jointly prepare a work, or pencil copy of the requisition, prior to formal submission of the typewritten requisition. Failure to comply with this requirement will cause a delay in the processing of the general Contractor's requisition request. The form for each progress payment shall be the Fairfax County School Board's 'Requisition for Partial Payment' and will be obtained from the School Board's Design and Construction Department. The form shall be completed in detail and submitted in 6 copies. The Owner will make a Progress Payment to the Contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under this contract, but to insure proper performance of this contract, the Owner will retain five (5) percent of the amount of each estimate properly allocable to labor, materials, and equipment incorporated into the work and ten (10) percent of the amount of each

estimate properly allocable to materials and equipment suitably stored at the site until final completion and acceptance of all work covered by this contract."

9.3.3 Amplify sub-paragraph by adding: "The Owner reserves the right to require a release of liens from each subcontractor covering work for which each progress payment is made."

9.7.1 Delete sub-paragraph in its entirety and substitute: "Upon written notification by the Contractor that the work or designated portion thereof is substantially complete, the Architect with the Owner's Representative will prepare a list of items to be completed or corrected. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all work in accordance with the Contract documents. When the Architect on the basis of an inspection determines that the work is substantially complete, he will then prepare a Certificate of Substantial Completion, stating the responsibilities of the Owner and the Contractor for maintenance, heat, utilities, and insurance, and fixing the time specified in Division I, Section 01700, within which the Contractor shall complete the items listed therein. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate."

9.7.2 Add the following:

1. A sum of money equal to the percentage of the Contract price as listed in

the schedule below will be retained by the Owner from the final payment, for a period of not less than one calendar year from the date of substantial completion.

2. This retained sum of money will be held as a security for the performance by the Contractor of any and all work of his contract that may be found within the stated period, to have been improperly performed or to be incomplete and for the replacing and making good of any work or material that is found to be defective or that has unduly deteriorated during the stated period, all as judged and determined by the Owner and in accordance with the following schedule:

Cost of Contract	Retained Percentage
Up an and including $ 50,000	1.00%
Above $ 50,000 to $ 750,000	0.75%
Above $ 750,000 to $1,250,000 inclusive	0.60%
Above $1,250,000 to $2,000,000 inclusive	0.50%
Above $2,000,000 to $3,000,000 inclusive	0.425%
Above $3,000,000	0.4%

3. If any such work deficiencies are discovered within the stated period, then within three days after notice from the Owner, commence to remove all defective and deteriorated work and material and replace with work and material in accordance with Contract requirements and to complete all uncompleted work within a reasonable time.

4. In the event of failure to begin the aforesaid work within three days and

to complete the work within a reasonable time thereafter, the Owner will cause such work to be done by other parties and deduct the cost thereof from the retained percentage.

5. The retained percentage or any balance thereof that may be left after payment has been made for making good defective or deteriorated work or completing uncompleted work of the Contract that has been done by other parties, will be paid to the Contractor after the expiration of the stated period of one calendar year.

Add the following paragraphs and sub-paragraphs to Article 9:

9.8 LIQUIDATED DAMAGES

9.8.1 The Contractor agrees to execute and substantially complete the Work in accordance with the times scheduled for completion in Section 01010—Summary of the Work, Alternates, and Allowances, Paragraph 3.1, B. "Schedule for Delivery of the Work," and should the Work not be substantially completed, and so certified by the Architect, it is understood and agreed that there will be deducted from the final payment as liquidated damages, but not as a penalty, for each day's delay beyond the date of substantial completion, and until certified and substantially complete and accepted by the Owner and Architect, per consecutive calendar day, the sum of $200 for each interim completion date, and the sum of $400 for the total project completion date.

9.8.2 The Contractor also agrees that from the date of issue of each punch list the work required by that punch list shall be completed within ninety (90) days. Should the work not be completed within the ninety (90) day period, it is understood and agreed that there will be deducted from the contract balance for each day's delay the sum of $50.00 for each uncompleted punch list until such work is completed.

9.9 DIRECT REIMBURSEMENT OF SUBCONTRACTORS

9.9.1 The provisions of this contract regarding payment to the General Contractor notwithstanding, the Owner shall have the right to satisfy the claims of Subcontractors directly under the following conditions:

(1) the Subcontractor's claims are for work already done or materials furnished;

(2) the Subcontractor provides the Owner with satisfactory proof of the amount of its claim;

(3) the Subcontractor provides the Owner with satisfactory proof that the claimed amount is due and owing from the General Contractor;

(4) the Subcontractor has made timely demand for payment from the General Contractor;

(5) The Owner gives the General Contractor twenty-one days advance notice of intention to make direct payment to the Subcontractor; and

(6) the General Contractor presents no reasonable good-faith basis for refusing to pay the Subcontractor's claim.

9.9.2 As a condition of payment under 9.9.1 above, the Subcontractor will be required in writing to hold the Owner harmless and to guarantee to the Owner that it will reimburse the General Contractor, as third-party beneficiary of the guarantee, for the lesser of the following amounts:

(1) the difference between the amount paid to it under 9.9.1 above and the amount agreed upon by the Subcontractor and the General Contractor in their contract for the work or material which is the subject of the claim; or

(2) the difference between the amount paid to it under 9.9.1 above and the fair market value of the work and/or material which is the subject of the Subcontractor's claim.

9.9.3 Payment by the Owner of any Subcontractor's claim under 9.9.1 above shall operate as conclusive proof of the correctness of the amount of such claim as between the Owner and the General Contractor, and the General Contractor shall have no right to recover any amount from the Owner on any claim arising from the Owner's payment of any Subcontractor's claim under 9.9.1 above. Owner is specifically relieved of liability for any amounts described in 9.9.2 (1) or (2) above.

15.8 Modifications and Additions to ARTICLE 10—PROTECTION OF PERSONS AND PROPERTY

10.1.2 New sub-paragraph: "This project shall be subject to the provisions of the current edition of 'Rules and Regulations Covering Construction, Demolition and All Excavation', as adopted by the Safety Codes Commission of the Commonwealth of Virginia".

10.1.3 New sub-paragraph: "In addition to other safety requirements and restrictions, the project shall be subject to the requirements and provisions of the Occupational Safety and Health Administration (OSHA), and the Contractor shall be responsible for compliance with such requirements and provisions at no added cost to the Owner."

10.1.4 The Contractor shall provide six (6) new OSHA approved type hard hats for the Owner's use throughout the life of the project. The hard hats will be returned to the Contractor following the Architect's certification of substantial completion of the project.

15.9 Modifications and Additions to ARTICLE 11—INSURANCE

11.1.1 The existing sub-paragraph shall receive the identifying prefix "B", and shall be preceded by a new sub-paragraph to read as follows: "A. During the term of the Contract, the Contractor shall, at his own expense, purchase and maintain the following insurance in companies properly licensed and satisfactory to the Owner, who shall be designated on the policy as "The County School Board of Fairfax County,

Virginia" as an additional named insured, except for Workmen's Compensation where the correct certificate of insurance coverage shall be furnished:

1. Workmen's Compensaiton including Occupational Disease and Employer's Insurance;

   (a) Satutory—Amounts and coverage as required by District of Columbia, Maryland and Virginia Workmen's Compensation Law including provision for Voluntary D.C. benefits as required in labor union agreements and including the 'All States' endorsement.

   (b) Employer's Liability—At least $100,000 each accident.

2. Public Liability, including coverage for direct operations, sublet work, elevators, contractual liability, and completed operations with limits not less than those stated below:

   (a) Bodily Injury Liability—including Personal Injuries—$1,000,000 each person; $1,000,000 each occurrence; $1,000,000 aggregate.

   (b) Property Damage Liability—$1,000,000 each occurrence; 1,000,000 aggregate.

   Regarding Property Damages: Include Broad Form Property Damage; Remove "XCU" Exclusions (explosion, collapse, underground property damage). Regarding Completed Operations

Liability: Continue coverage in force for one year after completion of work.

3. Comprehensive Automobile Liability Insurance, including coverage for owned, non-owned, and hired vehicles, with limits not less than:

   (a) Bodily Injury Liability; $1,000,000 each person, $1,000,000 each occurrence.

   (b) Property Damage Liability; $1,000,000 each occurrence.

4. Liability Insurance may be arranged by Comprehensive General Liability policies for the full limits required; or by a combination of underlying Comprehensive Liability policies for lesser limits with the remaining limits provided by an Excess or Umbrella Liability Policy to $5,000,000.

11.3 PROPERTY INSURANCE

Delete entire content and substitute as follows:

11.3.1 The Contractor shall purchase and maintain property insurance upon the entire work at the site to the full insuranble value thereof. This insurance shall include the interests of the Owner, Subcontractors and Sub-Subcontractors in the work and shall insure against the perils of Fire, Extended Coverage, Vandalism and Malicious Mischief.

11.3.2 Any insured loss is to be adjusted with the Contractor and made payable to the Contractor as trustee for the insured, as their interests may appear, subject to the re-

quirements of any applicable mortgagee clause and of sub-paragraph 11.3.7.

11.3.3 The Contractor shall file a copy of all policies with the Owner before an exposure to loss may occur. If the Owner is damaged by failure of the Contractor to purchase or maintain such insurance, and to so notify the Owner, then the Contractor shall bear all costs properly attributable thereto.

11.3.4 If the Owner requests in writing that other special insurance be included in the property insurance policy, the Contractor shall, if possible, include such insurance, and the cost thereof shall be charged to the Owner by appropriate Change Order.

11.3.5 The Owner and Contractor waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under this Paragraph 11.3, except such rights as they may have to the proceeds of such insurance held by the Contractor as trustee. The Contractor as trustee. The Contractor shall require similar waivers by Subcontractors and Sub-Subcontractors in accordance with sub-paragraph 5.3.1.5.

11.3.6 If required in writing by any party in interest, the Contractor as trustee shall, upon the occurrence of an insured loss, give bond for the proper performance of his duties. He shall deposit in a separate account any money so received, and he shall distribute it in accordance with such agreement as the parties in interest may reach. If after such loss no other special

agreement is made, replacement of damaged work shall be covered by an appropriate Change Order.

11.3.7 The Contractor as trustee shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object, in writing within ten days after the occurrence of loss, to the Contractor's exercise of this power.

15.10 Modifications and Additions to ARTICLE 12—CHANGES IN THE WORK

12.1.6 Delete the words "twenty days" and insert "ten days".

Delete title and content of paragraph 12.2 and substitute:

12.2 CONTRACTUAL CLAIMS PROCEDURES

12.2.1 All claims by the contractor arising out of or relating to the performance of the Work or any termination hereunder shall be made in writing and shall be decided by the Director of the Office of Design and Construction or his designated representative. All claims shall be filed with the Office of Design and Construction within five (5) calendar days after sustaining the injury underlying the claim. Failure to comply with this provision shall constitute an absolute waiver of such claim. The Director or the Office of Design and Construction of his designated representative shall issue his written decision within thirty (30) days of his receipt of the written claim which decision shall be final.

12.3.1 Add to the sub-paragraph: "The Contractor shall submit in duplicate a proposal to perform the change in complete breakdown form showing all units of labor, material, profit, and overhead. General Contractor's combined overhead and profit shall not exceed 15 percent (15%). Profit and overhead percentages shall include supervision and bond costs."

ARTICLE 16—SPECIAL CONDITIONS

16.1 Conflict of Provisions

.1 Any provision of the Conditions of the Contract or of any other document incorporated herein by reference, which is in conflict or inconsistent with "Instructions to Bidders", except such provisions as are required by applicable codes, laws, or regulations, shall be void to the extent of such conflict or inconsistency.

16.2 Intent of Specifications

.1 The sub-division of the Drawings and Specifications into sections is for the purpose of simplification only. The responsibility for the segregation of the work of the various trades rests with the General Contractor. It is the intent of the Specifications to amplify the requirements of materials and methods.

.2 The mention in any Section of the Specifications of any article or operation requires that the Contractor shall provide all such items indicated on, or reasonably inferred from the Drawings; furnishing for the purpose all labor materials, and equipment required. Omission of any article or operation does not relieve the

Contractor of the responsibility for completion of the work as intended by these Drawings and Specifications to be included in the Contract.

16.3 Examination of Site

.1 Bidders are required to visit the site and examine all existing conditions, compare the drawings and specifications with any work in place, and inform themselves of all conditions, including other work, if any, being performed. Bidders shall verify location and characteristics of all existing utility piping and electrical service. Each bidder shall verify dimensions and fully inform himself of the nature and scope of the proposed work and also the conditions under which it is to be conducted. He shall report to the Architect any conditions which in his estimations might preclude him from performing the Work in the manner shown and or specified. Failure to visit the site will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any work that may be required to compete the Work in accordance with drawings and specifications without additional cost to the Owner or extension of Contract Time.

16.4 Laying Out Work

.1 Contractor shall, immediately upon entering the project site for the purpose of beginning work, locate all general reference points and take such necessary action to prevent their destruction; lay out his own work, except where otherwise required by Contract Documents, and be responsible for all lines, elevations, and measurements of buildings, grading, paving, utilities, and other work executed by him under the contract. He must exercise

proper precaution to verify figures shown on Drawings *before* laying out work and will be held responsible for any error resulting from his failure to exercise such precaution.

.2 The Contractor shall establish permanent bench marks referenced to finish floor lines. Contractor shall employ a licensed surveyor who shall, after masonry corners have been set, certify over his seal to the Owner that additions are located properly in relation to property lines and/or existing construction in accordance with Drawings.

16.5 Owner's Representative:

.1 The Owner will provide one or more full-time representatives to observe the work. The presence of the Owner's Representative shall in no way be construed by the Contractor as an approval of methods or materials which do not conform to the requirements of the Contract.

16.6 Inspection and Approval of Site Improvements:

.1 On-site and off-site improvements shall conform to the County of Fairfax Design and Construction Standards.

.2 Except as otherwise specified, the Contractor shall pay fees required for permits and shall furnish any bond required.

16.7 Temporary Facilities:

.1 The Contractor shall furnish a temporary field office with telephone, office equipment as he may need, storage, storage sheds, sanitary facilities required by applicable safety and health regulations for workmen, and keep such facilities maintained at all times in a sanitary condition.

.2 The Contractor shall provide for the Owner's Field Representative a field office with plan desk, heat, power, and telephone.

16.8 Temporary Utilities

.1 The Owner will pay the cost of any gas, water, fuel oil, or electricity actually consumed from the existing utilities. It shall be the responsibility of the Contractor to provide the utility connection, temporary or permanent, to complete the work or conduct tests as required. Any temporary facilities provided by the Contractor shall be removed by him, at his expense, when no longer required or at the completion of the project.

.2 Any additional temporary utilities required by the Contractor to perform the Work shall be provided by the Contractor at his own expense.

16.9 Use and Occupancy

.1 The Contractor agrees to permit the Owner to use and occupy a portion or unit of the project before formal acceptance by the Owner, provided that the Owner:

a. Secures written consent of the Contractor (except in the event in the opinion of the Architect, the Contractor is chargeable with unwarranted delay in final clean up of punch list items or other contract requirements, the Owner may occupy without Contractor's consent);

b. Secures endorsement from the insurance carrier and consent of the surety to permit occupancy of the building or use of the project during the remaining period of construction.

.2 Use and occupancy prior to formal acceptance does not relieve the Contractor of his responsibility to maintain the required contract insurance coverage on a 100% basis for the benefit of the Owner, the prime Contractor, and all Subcontractors until the project is completed and accepted by the Owner.

16.10 Release of Bonds

.1 The Surety Corporation providing the bonds for this project shall obtain a written release from the Owner prior to the expiration date of the bonds.

16.11 Final Payment

.1 Payment in full is due within thirty (30) days after final completion of the contract, except for an amount mutually agreed upon to cover any work remaining uncompleted. See Article 9, paragraph 9.7.2 of the General Conditions and as modified by this Section of the Specifications.

16.12 Materials or Equipment

.1 No materials or equipment containing asbestos shall be utilized in the construction of the project.

Section 00950
Drawings Index

Sheet No.	Description
C-1	Cover Sheet
C-2	Site Plan
C-3	Drainage Divides and Erosion Siltation Control Plan
C-4	Plan and Profile—Sight Distance
A-0	Architectural Site Plan
A-1	Overall Floor Plan and Finish Schedule
A-2	Demolition Plan—Part A
A-3	Demolition Plan—Part B
A-4	Demolition Plan—Part C
A-5	Demolition Plan—Part D
A-6	Demolition Plan—Part E First Floor
A-7	Demolition Plan—Part E Second Floor
A-8	Demolition Plan—Part F
A-9	Demolition Plan—Part G
A-10	Demolition Plan—Part H
A-11	Demolition Plan—Part I First Floor
A-12	Demolition Plan—Part I Second Floor
A-13	Demolition Plan—Part J First Floor
A-14	Demolition Plan—Part J Second Floor
A-15	Demolition Plan—Part K
A-16	Floor Plan—Part A
A-17	Floor Plan—Part B
A-18	Floor Plan—Part C
A-19	Floor Plan—Part D
A-20	Floor Plan—Part E First Floor
A-21	Floor Plan—Part E Second Floor
A-22	Floor Plan—Part F
A-23	Floor Plan—Part G
A-24	Floor Plan—Part H
A-25	Floor Plan—Part I First Floor
A-26	Floor Plan—Part I Second Floor
A-27	Floor Plan—Part J First Floor
A-28	Floor Plan—Part J Second Floor
A-29	Floor Plan—Part K
A-30	Exterior Elevations
A-31	Wall Sections—Part A, B, & C
A-32	Building & Wall Sections—Part D
A-33	Wall Sections & Details—Part D & E
A-34	Sections & Details—Part F
A-35	Auditorium Details—Part F
A-36	Wall Sections—Part G
A-37	Building & Wall Sections—Part J
A-38	Canopy Details
A-39	Foor Schedule
A-40	Door Details
A-41	Door & Window Details
A-42	Toilet Room Layouts & Elevations

Sheet No.	Description
A-43	Equipment Layout—Part A
A-44	Equipment Layout—Part B
A-45	Equipment Layout—Part C
A-46	Equipment Layout—Part D
A-47	Equipment Layout—Part E First Floor
A-48	Equipment Layout—Part E Second Floor
A-49	Equipment Layout—Part F
A-50	Equipment Layout—Part G
A-51	Equipment Layout—Part H
A-52	Equipment Layout—Part I First Floor
A-53	Equipment Layout—Part I Second Floor
A-54	Equipment Layout—Part J First Floor
A-55	Equipment Layout—Part J Second Floor
A-56	Equipment Layout—Part K
A-57	Roof Plan
A-58	Roof Details
A-59	Roof Details
A-60	Stage Dimming Plan
S-1	Foundation Plans
S-2	Structural Framing Plans
S-1	Foundation Plans
S-2	Structural Framing Plans
M-1	Mechanical Notes and Symbols
M-2	Demolition Plan—Part A
M-3	Demolition Plan—Part B
M-4	Demolition Plan—Part C
M-5	Demolition Plan—Part D
M-6	Demolition Plan—Part E First Floor
M-7	Demolition Plan—Part E Second Floor
M-8	Demolition Plan—Part F
M-9	Demolition Plan—Part G
M-10	Demolition Plan—Part H
M-11	Demolition Plan—Part I First Floor
M-12	Demolition Plan—Part I Second Floor
M-13	Demolition Plan—Part J First Floor
M-14	Demolition Plan—Part J Second Floor
M-15	Demolition Plan—Part K
M-16	Floor Plan—Part A
M-17	Floor Plan—Part B
M-18	Floor Plan—Part C
M-19	Floor Plan—Part D
M-20	Floor Plan—Part E First Floor
M-21	Floor Plan—Part E Second Floor
M-22	Floor Plan—Part F
M-23	Floor Plan—Part G
M-24	Floor Plan—Part H
M-25	Floor Plan—Part I First Floor
M-26	Floor Plan—Part I Second Floor

Sheet No.	Description
M-27	Floor Plan—Part J First Floor
M-28	Floor Plan—Part J Second Floor
M-29	Floor Plan—Part K
M-30	Boiler Room Layout
M-31	Partial Floor Plans & Details
M-32	Roof Plan
M-33	Details
M-34	Details
M-35	Details
M-36	Equipment Schedules
M-37	Equipment Schedules
M-38	Equipment Schedules
P-1	Plumbing Notes & Symbols
P-2	Demolition Plan—Part A
P-3	Demolition Plan—Part B
P-4	Demolition Plan—Part C
P-5	Demolition Plan—Part D
P-6	Demolition Plan—Part E First Floor
P-7	Demolition Plan—Part E Second Floor
P-8	Demolition Plan—Part F
P-9	Demolition Plan—Part G
P-10	Demolition Plan—Part H
P-11	Demolition Plan—Part I First Floor
P-12	Demolition Plan—Part I Second Floor
P-13	Demolition Plan—Part J First Floor
P-14	Demolition Plan—Part J Second Floor
P-15	Demolition Plan—Part K
P-16	Floor Plan—Part A
P-17	Floor Plan—Part B
P-18	Floor Plan—Part C
P-19	Floor Plan—Part D
P-20	Floor Plan—Part E First Floor
P-21	Floor Plan—Part E Second Floor
P-22	Floor Plan—Part F
P-23	Floor Plan—Part G
P-24	Floor Plan—Part H
P-25	Floor Plan—Part I First Floor
P-26	Floor Plan—Part I Second Floor
P-27	Floor Plan—Part J First Floor
P-28	Floor Plan—Part J Second Floor
P-29	Floor Plan—Part K
P-30	Roof Plan
P-31	Sanitary Riser
P-32	Water Riser
P-33	Water Riser
P-34	Gas Risers
B-1	Symbols, Notes and Schedules
E-2	Demolition Plan—Part A
E-3	Demolition Plan—Part B

Sheet No.	Description
E-4	Demolition Plan—Part C
E-5	Demolition Plan—Part C
E-6	Demolition Plan—Part E First Floor
E-7	Demolition Plan—Part E Second Floor
E-8	Demolition Plan—Part F
E-9	Demolition Plan—Part G
E-10	Demolition Plan—Part H
E-11	Demolition Plan—Part I First Floor
E-12	Demolition Plan—Part I Second Floor
E-13	Demolition Plan—Part I First Floor
E-14	Demolition Plan—Part J Second Floor
E-15	Demolition Plan—Part K
E-16	Lighting Plan—Part A
E-17	Power Plan—Part A
E-18	Lighting Plan—Part B
E-19	Power Plan—Part B
E-20	Lighting Plan—Part C
E-21	Power Plan—Part C
E-22	Lighting Plan—Part D
E-23	Power Plan—Part D
E-24	Lighting Plan—Part E First Floor
E-25	Power Plan—Part E First Floor
E-26	Lighting Plan—Part E Second Floor
E-27	Power Plan—Part E Second Floor
E-28	Lighting Plan—Part F
E-29	Power Plan—Part F
E-30	Lighting Plan—Part G
E-31	Power Plan—Part G
E-32	Lighting Plan—Part H
E-33	Power Plan—Part H
E-34	Lighting Plan—Part I First Floor
E-35	Power Plan—Part I First Floor
E-36	Lighting Plan—Part I Second Floor
E-37	Power Plan—Part I Second Floor
E-38	Lighting Plan—Part J First Floor
E-39	Power Plan—Part J First Floor
E-40	Lighting Plan—Part J Second Floor
E-41	Power Plan—Part J Second Floor
E-42	Lighting Plan—Part K
E-43	Power Plan—Part K
E-44	Fire Alarm System
E-45	Sound System
E-46	Clock and Security System
E-47	Fire Alarm Riser Diagram First Floor
E-48	Fire Alarm Riser Diagram Second Floor & Sound Riser Diagram
E-49	Details Fire Alarm and Sound System
E-50	Electrical Riser Diagram and Panel Board Schedule
E-51	Overall Floor Plan

Section 01010
Summary of the
Work, Alternates
Allowances

PART 1—GENERAL

1.1 Project Work Identification:

A. General: Name of project is "Falls Church High School Renewal", as indicated on contract documents by The Fairfax Architects, P.C. The project number is 29-110. Contract documents are dated 5-1-88.

B. Contract Documents indicate the work of the Contract, and related provisions of project which may include but are not necessarily limited to the following:

1. Existing site conditions and restrictions.

2. Alterations and coordination and existing work.

3. Other work to be performed concurrently by Owner.

4. Requirements for Owner partial occupancy prior to substantial completion of work of Contract.

1.2 Miscellaneous and General Provisions:

A. Related Documents:

1. Drawings and general provisions of the Contract, including General and Supplementary Conditions and Division-1 through Division-16 Specification sections, apply to work of this section, and each with the other.

B. Examination of Site and Pre-Bid Conference:

1. Bidders are required to visit the site, compare the drawings and specifications with all

work in place, and inform themselves of all conditions, including other work, if any, being performed. Failure to visit the site and/or attend the pre-bid conference will in no way relieve the successful bidder from the responsibility to furnish any materials or perform any work that may be required to complete the work in accordance with drawings and specifications without additional cost to the Owner, or extension of Contract Time.

2. On Thursday, May 19, 1988, at 9:00 A.M., a pre-bid conference will be conducted at the Office of Design and Construction Services, School Administration Building, 10700 Page Avenue, Fairfax, Virginia.

C. Alterations and Coordination:

1. General: The work of this Contract includes coordination of entire work of project; including preparation of schedules, any required general coordination drawings diagrams, and control of site utilization; from the beginning of activity, through the project close-out and warranty periods.

2. Alterations: Where not indicated otherwise, requirements of contract documents apply for alteration work in same manner as for new work. Primarily, alteration work can be described as normal architectural, mechanical and electrical alterations.

D. Cutting and Patching:

1. Definition: Includes cutting and patching of both previously existing work and nominally completed portions of Contract work. Excludes shop fabrication of work, and normal installation procedures, including the drilling

of holes to install fasteners. Excludes special categories of work identified as alterations, demolition, cleaning, removal/replacement of noncomplying work and similar activities; although some of these activities may require cutting and patching.

2. General: Specific requirements and limitations for cutting and patching are shown and specified for certain types or work, and specified in other sections of Division 1 as required quality control procedures for general application to performance of the Work.

E. Completion of the Work; Time:

1. The Work shall be executed and substantially completed within the time specified, and should the Work not be substantially completed, and so certified by the Architect, it is understood and agreed that there will be deducted from the final payment as liquidated damages, but not as a penalty, for each day's delay beyond the date of substantial completion and until certified as substantially complete and accepted by the Owner and Architect, per consecutive calendar day, the sum of $200.00 for each interim completion date, and the sum of $600.00 for the total project completion date.

1.3 Alternates:

A. Definitions: Alternates are defined as alternate products, materials, equipment, installation, or systems for the work, which may, at Owner's option and under terms established by Instruction to Bidders, be selected and recorded in the Contract (Owner-Contractor Agreement) to either supplement or displace corresponding basic requirements of contract documents. Alternates

may or may not substantially change scope and general character of the Work; and must not be confused with "allowances", "unit prices", "change orders", "substitutions", and other similar provisions.

B. General Provisions: Each alternate is described herein, and is defined by abbreviated language, recognizing that drawings and specifications sections document the requirements. Coordination of related work is required to ensure that all work affected by each selected alternate is complete and properly interfaced with work of the alternate.

C. Notification: Immediately following award of Contract, prepare and distribute to each entity to be involved in performance of the work, a notification of status of each alternate. Indicate which alternates have been. 1) Accepted, 2) Rejected, and 3) Deferred for consideration at a later date as indicated. Include full description of negotiated modifications to alternates, if any.

D. Schedule of Alternates:

1. Alternate No. 1 (Add): Provide DDC Automatic Temperature Controls as described in Specification Section 15900.

2. Alternate No. 2 (Add): Provide Greenhouse as described in Specification Section 13123.

3. Alternate No. 3 (Add): Provide carpet as described in Specification Section 09680 in lieu of VCT in the following spaces:

   E-29, E-51, and E-52.

   J-13, J-15, J-16, J-22, J-24, J-25, J-27, J-28, J-29, J-40, J-41, and J-44.

2E-5, 2E-7, 2E-8, 2E-9, 2E-10, 2E-11, 2E-12, 2E-14, 2E-18, 2E-21, 2E-22, 2E-23, 2E-24, 2E-25, 2E-26, 2E-27, and 2E-28.

2I-1, 2I-2, 2I-3, 2I-5, 2I-6, 2I-7, 2I-9, 2I-10, 2I-11, 2I-12, 2I-13, 2I-14, 2I-15, and 2I-16.

2J-1, 2J-2, 2J-3, 2J-4, 2J-5, 2J-6, 2J-7, 2J-9, 2J-10, 2J-12, 2J-13, 2J-15, 2J-17, 2J-18, 2J-19, and 2J-20.

1.4 Allowances:

A. Contingency Fund:

1. Contractor shall include in the Base Bid the sum of One Hundred Fifty Thousand Dollars ($150,000.00), exclusive of overhead, profit, and bond mark-ups, to cover the cost(s) of authorized reimbursement for contingencies that may arise during the course of the Contract. At the end of the Project, any monies remaining in the Fund shall be deducted from the final payment and returned to the Owner. Contingency Fund shall be listed as a line item on the Schedule of Values and the Application for Payment.

B. Temporary Classroom Trailer Leasing:

1. Contractor shall include in the Base Bid the sum of Twenty-five Thousand Dollars ($25,000), exclusive of overhead, profit, and bond mark-ups, to cover the cost(s) of authorized reimbursement for the leasing of classroom trailer(s). Classroom trailer allowance shall be listed as a line item on the Schedule of Values and the Application for Payment.

C. Existing Elevator Improvements:

1. The Contractor shall include in the Base Bid the sum of Fifteen Thousand Dollars ($15,000), exclusive of overhead, profit, and bond mark-ups to cover the cost(s) of improvements to existing elevator. Existing elevator improvements allowance shall be listed as a line item on the Schedule of Values and the Application for Payment.

PART 2—NOT APPLICABLE

PART 3—EXECUTION

3.1 Summary of the Work: Briefly and without limiting the scope of the contract documents, work of the Contract can be summarized as follows:

A. The Work includes relocation and removal of existing equipment, demolition, new additions, built-up roofing, new partitions, painting, wood flooring, resilient flooring, carpeting, acoustical ceilings, plumbing, heating, ventilating, air conditioning, lighting, and sitework.

B. Schedule for delivery of the Work:

1. The Contractor shall erect and totally complete all work not later than August 31, 1989.

2. While school is in session fire exits shall remain unobstructed and the full school curriculum shall remain operational. Therefore, certain work shall be done only when school is not in session, and some portions of the work shall be completed before other portions of the work can be started.

3. Because 277/480V electrical service for lighting will not be available in Building Parts B. C. D, and E at the time of Notice to Pro-

ceed, the Contractor shall provide temporary 277/480V service connection from existing electric service located in Space A-40 for lighting in the following spaces: A-26 through A-29; B-14 through B-17; B-20 through B-23; B-25 through B-34; B-58, B-59, and C-22 through C-24.

4. Bus loop, Parking, curbs, gutters, sidewalks, flagpole, and storm sewer work adjacent to Marc Drive shall commence upon Notice to Proceed and shall be completed not later than August 15, 1988.

5. Part B work at Spaces B-14, B-15, B-16, B-17, B-20, B-21, B-22, B-23, B-25, B-26, B-27, B-28, B-29, B-30, B-31, B-58, B-59, B-32, B-33, and B-34 shall commence upon Notice to Proceed and shall be completed not later than November 30, 1988.

6. Work at Space B-2, B-3 and A-49 shall commence upon Notice to Proceed and shall be completed not later than March 1, 1989.

7. Part B work at Space B-53 and Child Care Play Yard shall commence upon Notice to Proceed and shall be completed not later than August 19, 1988.

8. Part C work at spaces C-23, C-22, and C-37 shall commence upon Notice to Proceed and shall be completed not later than August 31, 1988.

9. Part F work at Spaces F-1, F-2, F-3, F-4, F-5, F-33, F-34, F-35, F-36, and F-37 shall commence upon Notice to Proceed and shall be completed not later than November 30, 1988. Upon completion of these spaces, the balance of work in Part F shall commence and shall be completed within 90 days.

10. Part G work at Space G-1 and G-13 shall commence upon Notice to Proceed and shall be completed not later than September 30, 1988.

11. Part I work at Space I-5 and I-6, I-13, I-15, and I-18 shall commence upon Notice to Proceed and shall be completed not later than August 22, 1988.

12. Part J work at Spaces J-1, J-2, J-4, J-5, J-6, J-7, J-8, J-9, J-17, J-34, J-35, J-36, J-38, and J-42 shall commence upon Notice to Proceed and shall be completed not later than April 1, 1989.

13. Part D work at Space D-24 through D-33 shall commence September 12, 1988 and shall be completed not later than March 15, 1989.

14. Part B work at Space B-47, B-48, and B-49 shall commence December 1, 1988 and shall be completed not later than February 28, 1989.

15. Part J work at Spaces J-3, J-10, J-11, J-12, J-18, J-19, J-20, J-21, J-33, J-32, J-51, J-45, J-46, J-43, J-47 shall commence April 1, 1989 and shall be completed not later than June 15, 1989.

16. Part A-18 through A-28 shall commence June 15, 1989 and shall be completed not later than August 22, 1989.

17. Part A work at Spaces A-41 through A-45 shall commence June 15, 1989 and shall be completed August 22, 1989.

18. Part B work at Space B-38, B-39, B-40, B-41, B-42, B-43, and B-44 shall commence June 15, 1989 and shall be completed not later than August 19, 1989.

19. Part D work at Spaces D-8 through D-20 shall commence June 15, 1989 and shall be completed not later than August 22, 1989.

20. Part E work at Spaces E-3 through E-29 shall commence June 15, 1989 and shall be completed not later than August 22, 1989.

21. The balance of Part G work shall commence June 15, 1989 and shall be completed not later than August 12, 1989.

22. Part H work shall commence June 15, 1989 and shall be completed not later than August 19, 1989.

23. Part I work at spaces I-1, I-2, I-7, I-8, I-11, I-12, I-14, I-16, I-19, I-20, I-35, and I-36 shall commence June 15, 1989 and shall be completed not later than August 22, 1989.

24. Part K work at Spaces K-14, K-15, and K-18 through K-27 shall commence June 15, 1989 and shall be completed not later than August 22, 1989.

25. Balance of work including mechanical, plumbing, lighting, ceiling work, and painting in the existing building shall be scheduled jointly by the Contractor and the School Administration. A group of not more than six (6) contiguous classrooms shall be assigned to the Contractor for this work at any one time while school is in session, and all work in a group shall be completed before work can begin in any other classroom(s). This work shall be scheduled with the School Administration upon Notice to Proceed.

26. Re-roofing shall be accomplished after new mechanical roof-top units and any other penetrations have been installed. Contractor can

re-roof wings having no new roof penetrations in accordance with his own schedule.

27. When school is in session, and between the hours of 7:30 A.M. and 2:30 P.M., work in corridors shall be interrupted while students are changing classes. There is a change of classrooms once each hour, and five minutes is allowed for each change.

28. Heat shall be operable from October 15 through April 15 and hot water shall be available at all times.

EXHIBIT B

SCHLOSSER COMPANY INCORPORATED
Equal Opportunity Employer 916

GENERAL AND MECHANICAL CONTRACTORS

2400 51st Place, hyattsville, maryland 20871
telephone: (301) 773-1300
fax: (301) 773-9263

January 10, 1991

The County School Board
of Fairfax County
Department of Facilities
10700 Page Avenue
Fairfax, Virginia 22030

Attn: Mr. Thomas P. Hanton
Mr. Eugene Kelly

Re: Falls Church High School Renewal
Fairfax County Contract No. 090-88-RE-599

Subj: WMS No. 72—Claim for Extended Contract Performance

Gentlemen:

We are in receipt of your letter dated October 9, 1990, concerning our above-referenced claim. We understand from your letter that the matter has been referred to the architect for his decision.

We note that our claim was initially copied to the architect and we await his decision on our entire claim, in accordance with the contract requirements. We trust

that the architect will give this matter his impartial consideration.

Sincerely,

W.M. SCHLOSSER COMPANY, INC.

/s/ S.B.
SCOTT BURGESS
Project Manager

cc: William Peake, Fairfax Architects
Andrew Schlosser, W.M. Schlosser

EXHIBIT C

SCHLOSSER COMPANY INCORPORATED
Equal Opportunity Employer

GENERAL AND MECHANICAL CONTRACTORS

2400 51st place, hyattsville, maryland 20731
telephone: (301) 773-1300
fax: (301) 773-9263

March 27, 1991

The County School Board
of Fairfax County
Department of Facilities
10700 Page Avenue
Fairfax, Virginia 22030

Attn: Mr. Thomas P. Hanton
Mr. Eugene Kelly

Re: Falls Church High School
Fairfax County Contract No. 090-BB-RE-599

Subject: WMS Claim for Extended Contract Performance

Gentlemen:

Reference is made to our claim for extended contract performance in the amount of $1,152,941. This claim was submitted to the School Board and to the Architect, for his decision, on August 3, 1990. Although a reasonable amount of time has elapsed for the Architect to render his decision, to date there has been no written decision.

In accordance with Article 2.2.10 of our Contract we respectfully demand arbitration against the School Board with regard to this claim.

Sincerely,

W. M. SCHLOSSER CO., INC.

/s/ A.S.
ANDREW SCHLOSSER
President

AS:mke

cc: William Peake
Fairfax Architects
Roger Jones, Esquire

Certified Mail No. P 233 969 455

APR 9 199
OF THE CL

No. 92-1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

W.M. SCHLOSSER COMPANY, INC.
Petitioner,

v.

SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA
Respondent.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. CAWLEY
(Counsel of Record)
STUART A. RAPHAEL
HUNTON & WILLIAMS
3050 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-2200
Counsel for Respondent
Fairfax County School Board

April 9, 1993

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a principle of Virginia law by which Virginia school boards lack all powers not conferred by the State, including the power to enter into arbitration agreements?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

(1) Nature of the Case 1
(2) Statement of Facts 2
(3) Course of Proceedings 4

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. The Court of Appeals Properly Ruled That School Boards Lack the Authority to Arbitrate Under Virginia Law, and This Court Should Not Revisit That State Law Determination 10

II. The Court of Appeals' Decision Creates No Split of Authorities 11

III. The Court of Appeals' Construction of Virginia Law is Not Preempted by the Federal Arbitration Act 13

A. The Fourth Circuit Correctly Applied Existing Law 14

B. Congress Did Not Intend The FAA to Preempt A State's Right to Determine How Its Local Governing Bodies Resolve Their Legal Disputes ... 17

IV. The Issue Presented in This Case is Unlikely to Recur 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION:

U.S. CONST. art. I, § 8, cl. 3 ..... 9, 18, 21
U.S. CONST. amend. X 9, 17-18, 23

CASES:

Bishop v. Wood, 426 U.S. 341 (1976) 11
Boogher v. Stifel, Nicolaus & Co., 825 S.W.2d 27 (Mo. Ct. App. 1992) 12
Butner v. United States, 440 U.S. 48 (1979) 11
City of Atlanta v. Brinderson Corp., 799 F.2d 1541 (11th Cir. 1986) 12
City of Richmond v. Confrere Club, 239 Va. 77, 387 S.E.2d 471 (1990) 5
Coastal Indus., Inc. v. Automatic Steam Prod. Corp., 654 F.2d 375 (5th Cir. Unit B Aug. 28, 1981) 15
County Bd. v. Brown, 229 Va. 341, 329 S.E.2d 468 (1985) 6, 16
County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53 (1st Cir. 1971), *cert. denied*, 405 U.S. 944 (1972) 12
Daniels v. Williams, 474 U.S. 327 (1986) 11
District of Columbia v. Bailey, 171 U.S. 161 (1897) 10
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 10
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 9, 17-18, 23
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 23
Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370 (8th Cir. 1983) 11, 12
Lindon City v. Engineers Constr. Co., 636 P.2d 1070 (Utah 1981) 12
Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 253 Ga. 219, 320 S.E.2d 742 (1984) 13

. Page

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 21
New York v. United States, 112 S. Ct. 2408 (1992) 23
Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980) 15
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 11
Perry v. Thomas, 482 U.S. 483 (1987) 7-9, 14, 16-17, 25
Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 14, 16, 21
Richard L. Deal & Assocs. v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1983) 6
Saturn Distrib. Corp. v. Williams, 905 F.2d 719 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990) 7, 15, 16
Southland Corp. v. Keating, 465 U.S. 1 (1984) 21, 23-24
Supak & Sons Mfg. v. Pervel Indus., 593 F.2d 135 (4th Cir. 1979) 14-17
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 10, 21
Volt Info. Sciences, Inc. v. Stanford Univ., 489 U.S. 468 (1989) 14, 23-24
W. M. Schlosser Co. v. School Bd. of Fairfax County, 980 F.2d 253 (4th Cir. 1992) 1-11, 15-18, 25
Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 18

STATUTES:

9 U.S.C. §§ 1-16 (1988 & Supp. 1990) 2
9 U.S.C. § 2 (1988) 6-8, 13-16
9 U.S.C. § 4 (1988) 4
Virginia Public Procurement Act, Va. Code Ann. §§ 11-35 to -80 (Michie 1989 & Supp. 1992) 6, 24-25
Va. Code Ann. § 15.1-508 (Michie 1989) 6
Va. Code Ann. § 22.1-71 (Michie 1985) 6

Page

LEGISLATIVE AUTHORITIES:

64 Cong. Rec. 1931 (1924) 23
66 Cong. Rec. 984 (1924) 20
Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) 19-23
H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 21-22
S. Rep. No. 536, 68th Cong., 1st Sess. (1924) 20

MISCELLANEOUS:

Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153 (1924) 19-20, 22-23
Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265 (1926) 19-20, 22-23
U.C.C. § 2-207 (1990) 14-15, 17

No. 92-1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

W.M. SCHLOSSER COMPANY, INC.
Petitioner,

v.

SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Fairfax County School Board (the "School Board") opposes the Petition for Writ of Certiorari filed by W.M. Schlosser Company, Inc. ("Schlosser"), for the reasons set forth below.

STATEMENT OF THE CASE

(1) Nature of the Case

This is an appeal from the Fourth Circuit Court of Appeals' decision affirming the decision of the District Court declining to compel the School Board to enter into arbitration of a construction delay claim asserted by Schlosser. *W.M. Schlosser Co. v. School Bd. of Fairfax County*, 980 F.2d 253 (4th Cir. 1992). The District Court found that the parties did not intend to arbitrate their disputes, and that the School Board did not have the authority to arbitrate under Virginia law. The Fourth Circuit affirmed. *Id.* at 259. Without reaching the question of whether the parties intended

to arbitrate, the Fourth Circuit agreed with the District Court that school boards in Virginia may exercise only those powers conferred on them by the State, and that, under Virginia's strict construction of this principle, Virginia school boards do not have the authority to arbitrate. *Id.* at 254 n.4, 258. The Court of Appeals rejected Schlosser's contention that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1988 & Supp. 1990) ("FAA"), preempted Virginia law on this subject. The Court reasoned that Virginia law prevents local governing bodies from exercising *all* powers not conferred by the State, and that it does not single out arbitration, or discriminate against it. *Id.* at 258-59. Schlosser does not attempt to appeal expressly from the Fourth Circuit's interpretation of Virginia law. Schlosser contends, however, that this interpretation, endorsed by both the District Court and the Court of Appeals, is preempted by the FAA.

(2) Statement of Facts

Schlosser was hired by the School Board in 1988 to perform certain renovation work at Falls Church High School in Fairfax County, Virginia. The Contract provided that Schlosser would substantially complete the renovation project by August 31, 1989, in time for the beginning of the 1989-1990 school year. Schlosser failed to complete the project on time, and was warned in April 1990 that this delay might subject it to liquidated damages under the Contract.

Several months later, Schlosser contended that it was the School Board, not Schlosser, that was responsible for Schlosser's delays, and Schlosser submitted a claim to the School Board for $1,152,941 in damages that it had supposedly suffered as a result. Schlosser's claim was referred to the Architect, who awarded Schlosser a 7-day extension of time for completion of the Contract. The Architect, however, denied Schlosser's claim for money damages.

Schlosser's delay damage claim was barred by the "no-damage-for-delay" provision of the Contract (Petition at 102a, ¶ 7.10.1). Under that provision, any construction delays that were attributable to the School Board or its agents would be credited to Schlosser in the form of an extension of time for performance, and a corresponding reduction in any liquidated damages. Schlosser agreed in the

Contract, however, not to seek any money damages against the School Board resulting from any such delays (*id.*).

The Contract at issue consisted of a number of documents. The primary documents were the American Institute of Architects ("AIA") Standard Form of Agreement and the AIA standard form General Conditions of the Contract for Construction. In addition, the Contract contained a special set of "Modifications to General Provisions," which dealt specifically with the high school renovation project. The AIA standard forms appeared in fine print and occupied 22 single-spaced pages. The Record reflected that no lawyers for either party were involved in drafting the Modifications to the standard forms.

The standard AIA General Conditions contained an article calling for "arbitration" of claims and disputes arising under the Contract (Petition at 74a, Art. 7.10). This article required disputes to be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. The article also set forth the mechanism and procedures for demanding arbitration and provided, among other things, that the contractor would carry on its work during the pendency of any arbitration proceedings, unless the parties agreed otherwise.

This entire arbitration article was specifically and completely deleted by the Modifications, and replaced with the "no-damage-for-delay" clause mentioned above (Petition at 102a). The Record established that it was well known in the construction industry in Virginia that school boards lack any authority to arbitrate. It was also undisputed that the standard arbitration provision was deleted from the Contract in accordance with the school system's long-standing custom and practice of refusing to enter into *ultra vires* arbitration agreements. That practice was based on school officials' understanding that, under Virginia law, school boards do not have the authority to enter into arbitration agreements. 980 F.2d at 254 n.2. There was no evidence in the Record that Schlosser was unaware of this industry custom.

Although the central arbitration provision was deleted in its entirety, the draftsmen failed to delete several other references to arbitration contained in the pre-printed AIA form (Petition at 54a-55a, Arts. 2.2.10, 2.2.11). Schlosser based its demand for arbitration upon these unredacted references. This was the first time that

anyone had ever sought to compel the School Board to arbitrate a construction dispute.

(3) Course of Proceedings

Although the Architect's decision denying Schlosser's claim for delay damages was mailed to Schlosser on February 12, 1991, Schlosser's president, Andrew Schlosser, claimed that he never received it. On March 27, 1991, Schlosser mailed a demand for arbitration to the School Board and promptly filed a Petition to Compel Arbitration the next day in federal court, claiming that the School Board had not yet responded to Schlosser's arbitration demands. This was the first time that Schlosser had ever contended that disputes under the Contract were arbitrable.

The School Board filed an Opposition to Schlosser's Petition and demanded a jury trial of right, pursuant to 9 U.S.C. § 4 (1988), on the question of whether the parties had intended to arbitrate their disputes under the Contract.

The case was first heard by Magistrate Leonie M. Brinkema. The Magistrate found that it was unclear whether the parties had actually intended to arbitrate, given that the main arbitration provision had been deleted from the Contract and that the School Board had intended to eliminate arbitration altogether (Petition at 31a). The Magistrate also agreed that the School Board lacked the authority to arbitrate under Virginia law (*id.* at 32a). Accordingly, the Magistrate denied Schlosser's petition (*id.* at 27a).

Schlosser attempted to appeal the Magistrate's decision directly to the Fourth Circuit, but the Court of Appeals dismissed the appeal for lack of jurisdiction, and remanded the case to the District Court. 980 F.2d at 254 n.3. After another hearing on the merits, the District Court affirmed the Magistrate's findings (Petition at 16a, 26a). The Honorable Claude M. Hilton ruled as follows:

> Well, I find that it was the intent of the parties that the arbitration clause be removed from this contract. It was removed. The primary arbitration clause was taken out of the contract. It went even further when they took it out and said they couldn't even make a claim for these kind of damages.

> It is just clear the intent of the parties was to take out the arbitration provisions in the contract even though it may have been mentioned in passing in another area or two of the contract.
>
> I also find that the School Board doesn't have any authority to arbitrate in Virginia.

(Petition at 26a).

Schlosser appealed both findings to the Court of Appeals for the Fourth Circuit, which affirmed. 980 F.2d at 259. The Court stated that it did not need to reach the question of whether the parties had intended to arbitrate, because it agreed with the Magistrate's and the District Court's conclusion that Virginia school boards lack the authority to arbitrate under State law. 980 F.2d at 254 n.4.

The Court noted that Virginia strictly applies the "Dillon Rule" of statutory construction concerning the powers of local governmental entities:

> According to the Dillon Rule, local governing bodies such as counties, municipal corporations, and school boards "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."

980 F.2d at 255 (*quoting City of Richmond v. Confrere Club*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990)). The Court pointed out that this rule of statutory interpretation is given particularly strict enforcement by the courts of Virginia, such that " '[i]f there is *any* reasonable doubt whether legislative power exits, that doubt *must* be resolved against the local governing body.' " *Id.* at 255 (*quoting Confrere Club*, 289 Va. at 79-80, 387 S.E.2d at 473) (alteration in original). Indeed, the Court cited one recent case from the Supreme Court of Virginia in which it was held that the power to lease realty could not be implied from a county's express power to sell or

convey realty. *Id.* (*citing County Bd. v. Brown*, 229 Va. 341, 347, 329 S.E.2d 468, 472 (1985)).

The Court of Appeals then canvassed various Virginia authorities, and concluded that Virginia law did not permit the power to arbitrate to be implied from the School Board's power to contract, or from its power to sue and be sued. 980 F.2d at 255-58. The Court undertook an extensive analysis of the Virginia Public Procurement Act, noting that the General Assembly did not provide for arbitration of disputes involving school boards. *Id.* at 256. The Court also observed that the Virginia General Assembly had, in 1987, amended Va. Code Ann. § 15.1-508 (Michie 1989), to provide expressly that county governments (which are separate entities from local school boards in Virginia) could agree to arbitrate, "notwithstanding that county officials had long been authorized to contract by section 15.1-105 of the Virginia Code. . . ." 980 F.2d at 257. The Court noted that no similar amendment had been made to the parallel provisions governing the authority of Virginia school boards, found at Va. Code Ann. § 22.1-71 (Michie 1985). *Id.*

Finally, the Fourth Circuit examined Virginia case law, including decisions of the Supreme Court of Virginia, as well as published and unpublished decisions of the Virginia Circuit Courts. *Id.* at 257-58 & nn. 11-12. The Court observed that its conclusion that Virginia school boards lacked the power to arbitrate was fully consistent with these authorities. *Id.*; *see, e.g., Richard L. Deal & Assocs. v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983) (holding that agents of the State lacked the authority to enter into arbitration agreements absent an express grant of power from the Virginia General Assembly). Furthermore, the Court noted that any doubt about the existence of such an implied power was required under Virginia law to be resolved against the recognition of that power. 980 F.2d at 258.

Although Schlosser had not argued in the District Court that the Federal Arbitration Act preempted the application of Dillon's Rule in this case, the Court of Appeals rejected that claim as well. *Id.* at 258-59. The Fourth Circuit reasoned that the arbitration provision, even if it had become part of the parties' contract, was *ultra vires* and void under the "savings provision" of § 2 of the FAA, which provides that:

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

Id. at 258 (*quoting* 9 U.S.C. § 2 (1988)) (alteration in original). Since the School Board lacked the authority to arbitrate, the arbitration provision was void under § 2.

The Fourth Circuit distinguished this case from situations where a State singles out arbitration for discriminatory treatment, as in *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990). The Fourth Circuit noted that, in *Saturn*, it had invalidated a provision of a Virginia motor vehicle licensing statute that specifically prohibited automobile manufacturers and dealers from entering into agreements that included mandatory alternative dispute resolution provisions. 980 F.2d at 259. In this case, by contrast, the Dillon Rule as applied in Virginia did not single out arbitration agreements for discriminatory treatment, but denied *all* powers to school boards that were not conferred by the State. *Id.* at 259. The Court of Appeals pointed out that its decision was fully consistent with this Court's observation in *Perry v. Thomas*, 482 U.S. 483 (1987), that, under the FAA, "*state law*, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally . . . ." *W. M. Schlosser Co.*, 980 F.2d at 259 (*citing Perry v. Thomas*, 482 U.S. at 492 n.9) (first emphasis added).

Accordingly, the Court of Appeals affirmed the District Court's decision denying Schlosser's Petition to Compel Arbitration. 980 F.2d at 259. Schlosser's petition for a rehearing and suggestion for rehearing in banc was denied (Petition at 14a), and this Petition for Writ of Certiorari followed.

SUMMARY OF ARGUMENT

Applying State law, the Court of Appeals properly ruled that school boards in Virginia do not have the authority to enter into agreements to arbitrate. That conclusion was amply supported by a variety of Virginia legal authorities. Although Schlosser refers to these State law rulings in its Petition as "erroneous," it does not expressly contest these rulings, no doubt because Schlosser is well aware of this Court's "settled practice" of deferring to the Courts of Appeals on matters of State law interpretation. Accordingly, the only issue upon which Schlosser has petitioned for review by this Court is whether the FAA preempts Virginia's application of the Dillon Rule, pursuant to which school boards lack all powers not conferred by the State, including the power to enter into arbitration.

Schlosser cites a number of cases in its Petition in an effort to show that the Fourth Circuit's decision created a split in the Circuits on the preemption issue presented here. Those cases are inapposite, however, because they addressed the question of whether municipal corporations in other States possessed the implied authority to arbitrate under the law of those other States. None of those cases is controlling in Virginia. Moreover, Schlosser has not cited any case that interpreted the preemption issue presented for review here in a manner differently from the Fourth Circuit.

In any event, the Fourth Circuit properly found that Virginia law was not preempted by the FAA. Section 2 of the FAA provides that a written agreement to arbitrate in a contract involving interstate commerce is "valid, irrevocable and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). This Court observed in footnote 9 of *Perry v. Thomas*, 482 U.S. 483 (1987), that *state law*, whether legislative or judicial, applies to questions concerning contract formation, unless that law singles out or discriminates against arbitration.

Dillon's Rule, as applied in Virginia, denies to municipal corporations and school boards *all* powers not conferred by the laws of Virginia, and this rule is very strictly construed. Arbitration is only one of many powers that school boards are unable to exercise pursuant to this rule. Because Dillon's Rule is, as Schlosser acknowl-

edges, a general rule of contract formation that does not single out arbitration for discriminatory treatment, it is not preempted by the FAA.

Nonetheless, Schlosser urges this Court to adopt a new rule that provides that whenever the *result* of the application of State law is that arbitration cannot go forward, then that State law is preempted by the FAA. This sweeping rule would completely eliminate any need to look to State law because it would create a *per se* rule favoring arbitration. Schlosser does not attempt to anchor this proposed rule in any prior decision of this Court, and the Petition for Certiorari fails even to mention *Perry v. Thomas*.

Moreover, to the extent that Schlosser interprets the FAA as prohibiting States from deciding how their political subdivisions should resolve their legal disputes, Schlosser's unrestrained interpretation would also run afoul of this Court's recent Tenth Amendment jurisprudence. Where an interpretation of a federal statute enacted pursuant to the Commerce Clause would intrude upon areas traditionally occupied by State law, as in this case, preemption will not be presumed. *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). Instead, this Court requires that Congress provide a "plain statement" that this is the intended effect of the statute. The legislative history of the FAA, however, conclusively shows that Congress had no intention whatsoever of encroaching upon the rights of the States. Accordingly, the "plain statement" rule of *Gregory* is not satisfied here, and Schlosser's preemption theories must be rejected.

Finally, this case is factually unique. As the District Court determined, the draftsmen of the Contract intended to delete the arbitration provisions in their entirety, but they inadvertently failed to delete several scattered references to arbitration contained in the pre-printed form. Because this case arose solely by virtue of an omission in the drafting process, similar cases are not likely to arise in the future, and the precedential value of this case would be limited.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

ARGUMENT

I. The Court of Appeals Properly Ruled That School Boards Lack the Authority to Arbitrate Under Virginia Law, and This Court Should Not Revisit That State Law Determination.

The principal issue that Schlosser appealed to the Fourth Circuit was whether school boards have the authority to arbitrate *under Virginia law*. Now that the Court of Appeals has ruled squarely against Schlosser on that question, Schlosser couches its Petition to this Court as a request to review whether the Fourth Circuit's interpretation of Virginia law is preempted by the FAA. Although this appeal is ostensibly limited to that issue, however, Schlosser repeatedly asserts in its Petition for Certiorari that the Fourth Circuit's *state law* determinations were erroneous.

Schlosser carefully avoids any discussion of the Fourth Circuit's exhaustive analysis of Virginia law on this subject, *W.M. Schlosser Co.*, 980 F.2d at 255-57, and Schlosser's discussion of the law in other States falls short of the mark. While it is true, as Schlosser contends in part I of its Argument, that local governmental bodies in several other states have been found to have an implied power to arbitrate (Petition at 9-12), these cases are irrelevant to determining whether school boards *in Virginia* have the authority to arbitrate under Virginia law. Schlosser also relies heavily on the 1897 decision of this Court in *District of Columbia v. Bailey*, 171 U.S. 161 (1897), stating that the power to arbitrate may be implied from a municipality's power to contract. Yet *Bailey* applied a general federal common law of municipal corporations that did not survive *Erie R.R. v. Tompkins*.[1] Like the other cases cited by Schlosser, *Bailey* is simply not probative of how Virginia defines the authority of its own political subdivisions.

---

[1] 304 U.S. 64, 78 (1938) (abandoning doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and stating that "[t]here is no federal general common law.").

Schlosser does not challenge the Fourth Circuit's interpretation of Virginia law on this subject, and the reason is obvious. It is this Court's "*settled practice* to defer to the Courts of Appeals on questions of state law." *Daniels v. Williams*, 474 U.S. 327, 341-42 (1986) (emphasis added). This Court has repeatedly declined to revisit the state law determinations made by district courts and courts of appeals, even in cases where "an examination of the state law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346 (1976); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals."); *Butner v. United States*, 440 U.S. 48, 58 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."). In *Bishop*, for instance, this Court deferred to the district court's and the divided Fourth Circuit's interpretation of North Carolina law, in the absence of any authoritative interpretation by any North Carolina state court concerning the ordinance at issue. *Id.* at 345-46. Unlike in *Bishop*, however, there was ample Virginia authority on the State law question presented in this case, including at least three directly analogous holdings by the Supreme Court of Virginia. *See W.M. Schlosser Co.*, 980 F.2d at 257-58 & n.11 (collecting cases).

Accordingly, this Court should decline Schlosser's invitation to reexamine the Court of Appeals' interpretation of State law.

II. The Court of Appeals' Decision Creates No Split of Authorities.

Despite several references in the Petition for Certiorari to supposed splits in the Circuits created by the Fourth Circuit's decision, the cases cited by Schlosser simply do not reveal any such division on the question presented here.

In the principal case relied upon by Schlosser, *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370 (8th Cir. 1983), the Court of Appeals found that, *under Iowa law*, the City of Cedar

Rapids had the authority to enter into an arbitration agreement and that, having voluntarily done so, the City could be compelled to arbitrate under the FAA. *Id.* at 373, 379. That holding, of course, is of no moment with respect to whether *Virginia* school boards have the authority to arbitrate under Virginia law. The fact that Virginia law and Iowa law differ on this subject is an unremarkable feature of a multi-State system. It does not amount to a "split" among the United States Courts of Appeals on the federal preemption question presented in this case.

Similarly, Schlosser asserts that *City of Atlanta v. Brinderson Corp.*, 799 F.2d 1541 (11th Cir. 1986), and *County of Middlesex v. Gevyn Constr. Corp.*, 450 F.2d 53 (1st Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), are also at odds with the Fourth Circuit's holding. Like the court in *Johnson*, however, the Eleventh Circuit in *Brinderson* merely held that the City of Atlanta had the power under the law of the State of *Georgia* to enter into an arbitration agreement. 799 F.2d at 1543-44. In *County of Middlesex*, the First Circuit ruled that Massachusetts counties and cities have the authority under *Massachusetts law* to enter into arbitration agreements. 450 F.2d at 55. Neither the Eleventh Circuit nor the First Circuit even addressed the preemption issue.

The state court cases cited by Schlosser likewise fail to show any conflict with the Fourth Circuit's decision concerning federal preemption. In *Lindon City v. Engineers Constr. Co.*, 636 P.2d 1070, 1073-74 (Utah 1981), the Utah Supreme Court held that municipalities had the power to arbitrate under the law of *Utah*. No FAA issue was presented. Similarly, in *Boogher v. Stifel, Nicolaus & Co.*, 825 S.W.2d 27 (Mo. Ct. App. 1992), no question was raised about the authority of a municipality to submit a dispute to arbitration under the law of *Missouri*.

In short, therefore, Schlosser attempts to persuade this Court that there is somehow a split of authorities on the issue of *FAA preemption*, when the only cases Schlosser can point to are those holding that some municipalities in other states have been found to have the authority to arbitrate under *State law*. That Virginia school boards have been held not to have such authority under the law of Virginia does not contradict these cases, and Virginia is not alone

among those jurisdictions applying Dillon's Rule in this fashion.[2] Accordingly, there is no "split of authorities" on the question of whether the FAA preempts a State rule of construction by which municipalities are held to lack all powers not conferred by the State, including the power to arbitrate.

III. The Court of Appeals' Construction of Virginia Law is Not Preempted by the Federal Arbitration Act.

Stripped of its tacit invitation to this Court to review the construction of Virginia law by the courts below, Schlosser's Petition raises only the question of whether the FAA preempts the Fourth Circuit's holding that Virginia school boards lack the authority under State law to enter into agreements to arbitrate. As demonstrated above, Schlosser cites no case that reaches a conclusion on this subject that is contrary to the Fourth Circuit's.

In any event, however, the Fourth Circuit clearly decided this issue correctly under § 2 of the Federal Arbitration Act. That section provides, in pertinent part, as follows:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

---

[2] *See Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, 253 Ga. 219, 223, 320 S.E.2d 742, 746 (1984), applying the law of Georgia, and deciding the State law and the FAA preemption issues identically to the Fourth Circuit in this case. *Id.* at 223, 320 S.E.2d at 746 ("The arbitration clause here is invalid as an unauthorized arbitration agreement, and in a more general sense it is also invalid as an unlawful delegation of legislative authority. Since any contract unlawfully delegating legislative authority is ultra vires and void, we conclude that this arbitration clause is revocable upon 'grounds as exist at law or in equity for the revocation of any contract.' ").

9 U.S.C. § 2 (1988) (emphasis added). As this Court has recognized, Congress' purpose in 1925 in enacting this "savings clause" in § 2 "was to make arbitration agreements as enforceable as other contracts, *but not more so.*" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added); *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 478 (1989).

In *Perry v. Thomas*, 482 U.S. 483 (1987), this Court addressed the question of what law must be applied in determining in the first instance whether arbitration has properly become part of the contract between the parties. The Court observed that "*state law*, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 493 n.9 (first emphasis added). The Court went on to explain, however, that state law may not single out arbitration for discriminatory treatment as compared to its treatment of other kinds of contracts. *Id.*

A. The Fourth Circuit Correctly Applied Existing Law.

The Fourth Circuit has had three occasions on which to apply these principles, and it has done so correctly each time. First, in *Supak & Sons Mfg. v. Pervel Indus.*, 593 F.2d 135 (4th Cir. 1979), the Fourth Circuit considered a claim that the FAA preempted application of § 2-207 of the Uniform Commercial Code. That case involved the sale of fabric by a New York seller to a North Carolina buyer. Each verbal request by the buyer was memorialized by the seller through a standard confirmation form that contained an arbitration clause. 593 F.2d at 136. After a dispute arose, the seller moved to compel arbitration under this provision. The district court denied the motion, finding that the arbitration provision had not become part of the parties' contract, and the Fourth Circuit affirmed. *Id.* at 137. The Court of Appeals reasoned that, whether construed under the U.C.C. provisions of New York or of North Carolina, an agreement to arbitrate contained in a seller's confirmatory memorandum constituted a "material alteration" to the buyer's offer that did not become part of the parties' contract under U.C.C. § 2-207. *Id.* at 136-37.

The Fourth Circuit specifically rejected the seller's claim that this operation of state law was preempted by § 2 of the FAA. *Id.* at 137. The Court reasoned that § 2-207 expressed a "general rule of contract formation" that did not apply "only to arbitration clauses," but to *any term* in a confirmatory memorandum that constituted a "material alteration." *Id.* Accordingly, § 2-207 was not preempted, even though it prevented arbitration from going forward.[3]

The Fourth Circuit again confronted the preemption issue in *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990). The Court in *Saturn* held that the FAA did preempt a Virginia statute that specifically prohibited automobile manufacturers from entering into agreements that included mandatory dispute resolution provisions. *Id.* at 726. This statute was preempted, the Court reasoned, because it "single[d] out arbitration clauses and unreasonably burdened the ability to form arbitration agreements." *Id.* at 723. The Court distinguished that statute from the "general rule of contract formation" that it had considered in *Supak & Sons*. *Id.* at 726.

Finally, in its holding below in this case, the Fourth Circuit determined that the inability of Virginia school boards to exercise powers not expressly granted to them, including the power to arbitrate, was a general rule of contract formation, and that the case, therefore, was governed by *Supak & Sons*:

> The Dillon Rule . . . does not single out and disproportionately burden arbitration provisions. It is a rule of general applicability that defines and invalidates all *ultra vires* acts of local governing bodies.

---

[3] The Fourth Circuit's holding in *Supak & Sons* has been followed by other courts construing the interplay between U.C.C. § 2-207 and § 2 of the FAA. *E.g.*, *Coastal Indus., Inc. v. Automatic Steam Prod. Corp.*, 654 F.2d 375, 379 (5th Cir. Unit B Aug. 28, 1981) ("Whether an arbitration clause is a material alteration is a determination which is made on a state-by-state basis."); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 53 & n.6 (3d Cir. 1980) (holding that a jury trial was required to determine if the parties intended to arbitrate their disputes and, following *Supak & Sons*, assuming that an arbitration provision contained in unilateral confirmation was a material term that did not become part of the parties' contract under U.C.C. § 2-207).

> Unlike the provision drawn into question in *Saturn*, the Rule is not "an idiosyncratic rule specific to arbitration agreements," but is instead "merely an unremarkable part of Virginia's general laws of contract formation." [905 F.2d] at 725. As "a general rule of contract formation," *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.* 598 F.2d 135, 137 (4th Cir. 1979), it constitutes a "ground[] as exist[s] at law or in equity for the revocation of any contract," within the meaning of 9 U.S.C. § 2. As such, it falls within the exception to section 2's general rule of enforceability of arbitration, and therefore is not preempted by the FAA.

980 F.2d at 259. Under Virginia's application of Dillon's Rule, arbitration is treated no better and no worse than any other governmental power that has not been conferred by the legislature. *Cf. County Bd. v. Brown*, 229 Va. 341, 346-47, 329 S.E.2d 468, 471-72 (1985) (holding that the power to lease realty could not be implied from the county's express power to sell or to convey realty).

The FAA does not require that Virginia alter its rules of statutory construction in order to make unauthorized arbitration contracts more enforceable than other kinds of unauthorized contracts. "As the 'savings clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

The *Supak-Saturn-Schlosser* trilogy of Fourth Circuit cases clearly reflects the correct application of this Court's choice-of-law rules as articulated in footnote 9 of *Perry v. Thomas*, 482 U.S. at 493 n.9 ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). By contrast, Schlosser advocates a rule that looks only at the *"result"* of the application of State law (Petition at 13) ("While the Dillon Rule, *by itself*, is not subject to preemption, the *result* flowing from the court's misapplication of the Dillon Rule in this case is subject

to preemption.").[4] Schlosser's argument essentially boils down to this: (a) any State law hostile to arbitration is preempted; (b) if applying State law *results* in a denial of arbitration, then that State law must be hostile to arbitration; (c) therefore, all State laws resulting in a denial of arbitration are preempted. This approach, however, would eliminate the need to resort to State law in the first place, since any State law "resulting" in the denial of arbitration would be necessarily overridden. This Court has never promoted such a tortured syllogism, much less the *per se* rule compelling arbitration that Schlosser advocates. Not surprisingly, Schlosser does not attempt to ground such a rule in the decisions of this Court, and the Petition for Certiorari does not even mention this Court's decision in *Perry v. Thomas*.

B. Congress Did Not Intend The FAA to Preempt A State's Right to Determine How Its Local Governing Bodies Resolve Their Legal Disputes.

It is axiomatic that a State's determination of the powers that may be exercised by the various organs of its local government represents a quintessential feature of a State's sovereignty. Indeed, a function of this sort "goes beyond an area traditionally regulated by the States; *it is a decision of the most fundamental sort for a sovereign entity*." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991) (emphasis added). To the extent that Schlosser claims that the preemptive sweep of the FAA is so broad that it forbids States from directing their political subdivisions not to consent to arbitration, whether by affirmatively prohibiting arbitration, or by declining to grant the authority to arbitrate, Schlosser's interpretation would run afoul of this Court's recent Tenth Amendment jurisprudence.[5]

---

[4] Thus, Schlosser is forced to concede that Dillon's Rule is a "general rule of contract formation," just like U.C.C. § 2-207 considered in *Supak & Sons*. 593 F.2d at 137.

[5] Judge Niemeyer made precisely this observation at oral argument in the Fourth Circuit, when he stated that if the FAA were interpreted as forbidding States from expressly withholding from municipalities the power to arbitrate, this could

continued on next page

In *Gregory*, for example, this Court held that the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, did not preempt a provision of the Missouri Constitution that imposed a mandatory retirement age on Missouri judges. In so holding, this Court made clear that when Congress enacts a statute pursuant to its powers under the Commerce Clause, the exercise of that power is constrained by the Tenth Amendment, and the Court will not lightly conclude that Congress intended to "upset the usual constitutional balance of federal and state powers." 111 S. Ct. at 2401. The Court applied the following familiar standard:

> "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States. . . . 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' "

Id. at 2401 (*quoting Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (citations omitted)). The ADEA failed this "plain statement rule," the Court held, because it was ambiguous with respect to whether Congress intended for appointed state judges to be included within the scope of the ADEA's coverage, even though the Act otherwise extended to the States and their political subdivisions. 111 S. Ct. at 2406.

Applying *Gregory* to the facts of this case requires exactly the same conclusion, particularly since the legislative history of the FAA makes clear that Congress had no intention whatsoever of encroaching upon the States' authority to control how their localities resolve their legal disputes. The legislative history is silent with respect to the FAA's intended effect on contracts to which a State

---

continued from previous page

unconstitutionally encroach upon the rights of the States to direct the manner in which their local governing bodies resolve their legal disputes. In finding that the FAA did not preempt Virginia's application of Dillon's Rule, however, the Court of Appeals did not have to reach this issue.

or local government was a party. It was clear, however, that the FAA was not viewed as creating a *source* of authority to arbitrate, but only *a mechanism* for the enforcement of arbitration agreements. In fact, Congress did not believe that the FAA even affected substantive rights or that it would encroach upon the rights of the States in any way.

The initial draftsman of the FAA was Julius H. Cohen, a member of the American Bar Association Committee responsible for preparing the FAA, and General Counsel to the New York City Chamber of Commerce.[6] In Joint Hearings before Congress, Mr. Cohen explained that the FAA was needed, not as source of authority to arbitrate as a matter of substantive law, but because the antiquated common law as applied by the federal courts declined to grant specific performance of private arbitration agreements.

> Neither is it true that such a statute, when it declares arbitration agreements to be valid, declares their existence as a matter of substantive law. The courts have always recognized that such agreements have existed but have refused to enforce them. It was often said loosely that arbitration agreements were void, even under the common law rule. This statement was not accurate. While the courts refused to enforce arbitration agreements specifically, they recognized their existence because they gave another remedy. From the earliest times it was held that for a breach of arbitration agreement the aggrieved party was entitled to damages.

---

[6] *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. 13, 15 (1924) [hereinafter *Joint Hearings*]. Following the FAA's enactment, Mr. Cohen also co-authored two of the commentaries illustrative of the contemporary understanding of the scope of the new law. *See* Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 156 (1924); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265 (1926).

> In no proper sense, therefore, was the arbitration agreement void. It was valid in the same sense that most contracts are valid, i.e., while specific performance would not be given, a remedy for a breach existed in the right to recover damages.

Joint Hearings, *supra* note 6, at 38 (citations omitted).[7] The Senate Report on the Bill echoed this theme,[8] as did the floor debates.[9]

Indeed, the sponsors of the Bill complained that federal courts sitting in states like New York and New Jersey – which had made arbitration agreements enforceable as a matter of State law – were declining to enforce arbitration agreements because they believed

---

[7] *See also* Cohen & Dayton, *supra* note 6, at 276-77 (same); Committee on Commerce, Trade and Commercial Law, *supra* note 6, at 155 (same).

[8] The Senate Report stated:

> It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or, if the agreement has been executed according to its terms and an award made, the appropriate action may be brought at law or in equity to enforce the award. Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.
>
> But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.

S. Rep. No. 536, 68th Cong., 1st Sess. 2 (1924).

[9] 66 Cong. Rec. 984 (1924) (statement of Sen. Walsh) ("In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.").

the issue to be controlled by the law of federal procedure.[10] Although recent decisions by this Court have since grounded the FAA in Congress' powers to regulate interstate commerce,[11] this was not

---

[10] *Southland Corp. v. Keating*, 465 U.S. 1, 34 (1984) (O'Connor, J., dissenting) ("[T]he FAA was passed specifically to rectify forum-shopping problems created by this Court's decision in *Swift v. Tyson*, 16 Pet 1, 10 L. Ed. 865 (1842). By 1925 several major commercial States had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases."); Joint Hearings, *supra* note 6, at 16 (noting that federal courts sitting in New York and New Jersey would not apply state law favoring arbitration in federal proceedings); *id.* at 39-40 ("the question of the enforcement of [arbitration agreements] relates to the law of remedies and not to substantive law . . . . Every one of the States in the Union might declare such agreement to be valid and enforcable [sic], and still in the Federal courts it would remain void and unenforceable . . . ."); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) [hereinafter *House Report*] ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.").

[11] The genesis of the notion that Congress exercised its powers under the Commerce Clause in enacting the FAA appeared in this Court's decisions for the first time in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967). Subsequently, in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, this concept matured into the observation in dictum, without citation to the legislative history, that the Act created "a body of *federal substantive law of arbitrability*, applicable to any arbitration agreement within the coverage of the Act." 460 U.S. 1, 24 (1983) (*citing Prima Paint*, 388 U.S. at 395) (emphasis added). This oft-cited quotation from *Moses H. Cone* blossomed into this Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984), where Chief Justice Burger, writing for the Majority, ruled that the FAA created federal substantive law that was enforceable in state courts, but that it did *not* create any independent federal question jurisdiction for federal courts. *Id.* at 15 n.9. *But see id.* at 24-25 (O'Connor, J., dissenting) (stating that the conclusion that the FAA creates "federal substantive rights" "is unquestionably wrong as a matter of statutory construction. . . . One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of federal courts.").

the contemporary understanding at the time of the statute's enactment.[12]

But regardless of whether the FAA was enacted pursuant to Congress' powers under the Commerce Clause, or under its Article III powers to establish and control the federal courts, it is clear that the FAA's drafters were concerned with creating a mechanism for the enforcement of private arbitration agreements,[13] and not with creating a source of authority to agree to arbitrate in the first instance.[14] As a result, the Act was not seen as affecting the authority of the States in any way. Thus, Congress was assured that:

> So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts *it does not encroach upon the province of the individual States.*
>
> * * *
>
> There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. *The statute cannot have that effect.*

Joint Hearings, *supra* note 6, at 38, 40 (emphasis added); *see also id.* at 37 ("It is no infringement on the right of each State to decide

---

[12] Joint Hearings, *supra* note 6, at 37 ("It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact. The statute as drawn establishes a procedure in Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."); *see also* Cohen & Dayton, *supra* note 6, at 275 (same); Committee on Commerce, Trade and Commercial Law, *supra* note 6, at 155 (same).

[13] House Report, *supra* note 10, at 1.

[14] *See, e.g.*, Cohen & Dayton, *supra* note 6, at 276 ("Neither is it true that such a statute, declaring arbitration agreements to be valid, is the source of their existence as a matter of substantive law.").

for itself what contracts shall or shall not exist under its laws."). Indeed, the Act's sponsor in the House, Representative Graham, stated in the floor debates that the Act "grants *no new rights*, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." 64 Cong. Rec. 1931 (1924) (emphasis added). Contemporary articles following passage of the Act also observed that it was not intended to encroach in any way upon the authority of the States.[15]

It would be a mockery of these repeated assurances to suggest that Congress somehow intended the FAA to upset the balance between state and federal government by dictating the way in which the States and their political subdivisions must resolve their legal disputes. Such a suggestion would also fly in the face of this Court's recent Tenth Amendment jurisprudence. *E.g., New York v. United States*, 112 S. Ct. 2408, 2420 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' ") (*quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Indeed, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 112 S. Ct. at 2421.

No field is more traditionally occupied by State law than the law concerning the scope of authority that may be exercised by a State's political subdivisions. Under Schlosser's view of the FAA, however, States could no longer determine the manner in which their political subdivisions resolve their legal disputes, because States could not withhold the power to arbitrate. Not surprisingly, there is nothing in the text or the legislative history of the FAA to support that result. The "plain statement rule" articulated in *Gregory* is not satisfied here, and Schlosser's expansive construction of the FAA must be rejected. *Accord Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 499 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."); *Southland Corp. v. Keating*, 465

---

[15] Cohen & Dayton, *supra* note 6, at 276, 277; Committee on Commerce, Trade and Commercial Law, *supra* note 6, at 155.

U.S. 1, 18 (1984) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress.") (Stevens, J., concurring in part, dissenting in part).

IV. The Issue Presented in This Case is Unlikely to Recur.

It is a rare occurrence when municipalities that do not believe themselves to have the power to arbitrate, and that do not intend to enter into arbitration agreements, nonetheless find themselves subjected to motions to compel arbitration. That anomalous situation arose in this case only by virtue of a drafting oversight. While deleting the central arbitration provision and replacing it with a provision that barred the contractor from seeking any damages for construction delays, the drafters of the Contract in this case, unassisted by counsel, inadvertently failed to delete several other references to arbitration contained in the standard, pre-printed AIA form. Although Schlosser later seized on these unredacted references to support its arbitration demands, Schlosser did not dispute that it was well known in the construction industry that the School Board could not arbitrate. As the District Court concluded, "the intent of the parties was to take out the arbitration provisions in the contract even though it may have been mentioned in passing in another area or two of the contract." (Petition at 26a).[16] Since this case would not have arisen but for this unintended drafting omission, its precedential value is quite limited, and it provides an ill-equipped vehicle with which to revisit the law surrounding the FAA.

---

[16] The Contract at issue here also provided that Virginia law would apply, (Petition at 71a, ¶ 7.1.1); and that, if any conflict arose between the provisions of the Contract and the Virginia Public Procurement Act, the Virginia Public Procurement Act would control (Petition at 102a-103a, ¶ 7.11.1). The first choice-of-law provision was identical to that applied by this Court in *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 470 (1989) (holding that the FAA did not preempt a California statute permitting a court to stay arbitration proceedings pending litigation of related claims, where the parties had agreed that

continued on next page

CONCLUSION

The Court of Appeals' decision properly applied the principles enunciated by this Court in footnote 9 of *Perry v. Thomas*, and did not create any split in the Circuits. Accordingly, review by this Court is not warranted, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

By: /s/ Thomas J. Cawley
Counsel

Thomas J. Cawley
(Counsel of Record)
Stuart A. Raphael
HUNTON & WILLIAMS
3050 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-2200
Counsel for Respondent
Fairfax County School Board

---

continued from previous page

California law would apply). The second provision also reflected that the parties never intended to arbitrate their disputes, because the Virginia Public Procurement Act, Va. Code Ann. §§ 11-35 to -80 (Michie 1989 & Supp. 1992), which sets forth procedures for resolving contract disputes between public entities and private contractors, does not provide for arbitration. *See W.M. Schlosser Co.*, 980 F.2d at 256 ("Indeed, the Act would appear to prohibit, by negative inference, decision by an arbitrator. . . .").